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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 196[illegible]

No. [illegible]9

ROBERT SHELTON, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 18, 1960
CERTIORARI GRANTED MARCH 27, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 246

ROBERT SHELTON, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[fol. A] [Caption omitted]

[fol. B] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Grand Jury Impanelled on August 30, 1956,
Sworn in on September 4, 1956

Criminal No. 1215-'56

Grand Jury Original 2 U.S.C. 192

UNITED STATES OF AMERICA

v.

ROBERT SHELTON

INDICTMENT—Filed November 26, 1956

On January 6, 1956, in the District of Columbia, the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, of the Committee on the Judiciary of the United States Senate, was conducting hearings, pursuant to the Legislative Reorganization Act of 1946, Section 102(1)(k), (60 Stat. 818), and to Senate Resolutions 366 of the 81st Congress and 58 of the 84th Congress, and to the Standing Rules of the Senate.

Defendant, Robert Shelton, appeared as a witness before that subcommittee at the place and on the date above stated, and was asked questions which were pertinent to the question then under inquiry. Then and there the defendant unlawfully refused to answer those pertinent questions.

The allegations of this introduction are adopted and incorporated into the counts of this indictment which follow, each of which counts will in addition merely describe the question which was asked of the defendant and which he refused to answer.

Count One

"Are you, sir, a member of the Communist Party U.S.A.?"

Count Two

"Did you ever have any conversation with Matilda Landsman?"

[fol. B1]

Count Three

"What did you tell them (your employers)?"

Oliver Gasch, United States Attorney in and for the District of Columbia.

A True Bill:

Paul Matthews, Foreman.

[fol. C] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PLEA OF DEFENDANT—Filed December 3, 1956

On this 30 day of November, 1956, the defendant Robert Shelton, appearing in proper person and by his attorney Joseph L. Routh, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is committed to the District of Columbia Jail.

By direction of F. Dickinson Letts, Presiding Judge, Criminal Court # Two, Harry M. Hull, Clerk, By Harold G. Dodd, Deputy Clerk.

Present: United States Attorney, By Joseph Lowther, Assistant United States Attorney, R. Frye, Official Reporter.

[fol. D] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Criminal No. 1215-56

[Title omitted]

MOTION TO DISMISS THE INDICTMENT OR FOR PRELIMINARY HEARING—Filed December 10, 1956

The defendant moves that the indictment be dismissed on the following grounds:

1. The indictment fails to plead the following essential and material elements of the offense:

a. the grant of authority pursuant to which the "Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws" presumed to exercise the powers of a committee of Congress and the nature and scope of any such grant of authority;

b. that the inquiry was within the scope of the authority of said Subcommittee;

c. the nature of the "question then under inquiry" to which the questions addressed to defendant are alleged to be relevant.

2. The indictment is void and illegal in that there were less than 12 members of the Grand Jury who concurred in finding the indictment who were free from prejudice or bias against this defendant, by reason of the facts stated in the affidavit of Joseph L. Rauh, Jr., attached hereto and made a part hereof.

Rec'd. 12-10-56—3:10 P.M.

Oliver Gasch, U. S. Attorney.
B. F.

[fol. E] In the alternative, the defendant should be granted a hearing at which he can offer proof by examination of the grand jurors and otherwise that bias or preju-

dice existed on the part of the requisite number of the grand jurors.

Joseph L. Rauh, Jr., John Silard, Attorneys for Defendant, 1631 K Street, N. W., Washington 6, D. C.

December 10, 1956
Personally served.

[fol. F] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AFFIDAVIT—Filed December 10, 1956

Joseph L. Rauh, Jr., being duly sworn, deposes and says:

1. I am one of the attorneys for the defendant named in the above bill of indictment.

2. This affidavit is made in support of the Motion to Dismiss the indictment on the ground that it is void and illegal in that the grand jury which voted the indictment was illegally constituted as to this defendant.

3. I have been informed that the grand jury records in this Court show that 14 of the 23 members of the grand jury which voted the indictment against this defendant were, at that time, employed by the Government of the United States.

4. On information and belief, less than 12 members of the grand jury which voted this indictment were free from bias and prejudice against the defendant and able to exercise an independent judgment, by reason of the fact that they were employed by the Government of the United States.

5. The alleged contempt occurred before a Subcommittee of the Committee on the Judiciary of the United States Senate. The official, public transcript of defendant's testimony before the Committee shows that practically all of questions addressed to defendant concerned Communists, Communism or the Communist Party. One of the three [fol. G] counts in the indictment alleges that defendant refused to state whether he was a member of the Communist Party, U.S.A., and another is based on defendant's refusal to answer one of a series of questions relating to whether he had told his employers about his Communist connections. All of the above information was available to the grand jury and it is reasonable to believe that it was informed of it.

6. Communism, membership in the Communist Party, or association with members of the Communist Party, present and past, has discreditable connotations and subjects persons accused of such associations to disrepute, to economic losses, and to possible criminal or administrative action. Congress, in the Communist Control Act of 1954, 68 Stat. 775, 50 U.S.C. 781, 792a, declared the Communist Party to be illegal.

7. Since the grand jury's indictment was based on defendant's refusal to reveal whether he was a member of the Communist Party and give other information on his Communist connections, it would appear to the members of the grand jury that the case inherently touched the security of the Government. As employees of the United States Government and subject to security programs thereof, the grand jurors employed by the Government could not consider the facts presented to them with disinterested, free and open minds without bias and prejudice, as required by law.

8. All persons who are employed by the United States are subject to investigation and proceedings under Executive Order No. 10450, entitled "Security Requirements for Government Employment." The Federal Bureau of Investigation is required to investigate all cases arising under the order which involve any questions of Communist as-

sociations. Executive Order No. 10450 provides that the employment of any civilian employee must be "clearly [fol. H] consistent with the interests of the national security" and grants to the heads of departments and agencies, the final determination, subject to no appeal, of whether this standard is met. One of the factors to be considered in an investigation under the Order is "Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy." Other factors not enumerated in the Order may be and are considered in making a security determination under the Order. Views, statements, and actions in cases such as this are considered pertinent in proceedings under the Order.*

9. The effect of more than 9 years of operation of successive loyalty and security programs has been to instil in Government employees a fear of creating the appearance of sympathetic attitudes toward any person accused of Communism or Communist associations. This fear in a grand juror is so strong, so personal and so intense that it would prevent him from casting his vote impartially, as required by his Oath and by law, and amounts to an actual [fol. I] bias against any person accused of some act which might impede the hunt for supposed Communists.**

---

* Although the decision of the Supreme Court in *Cole* v. *Young* (351 U.S. 536) rendered on June 11, 1956, has narrowed the scope of Executive Order 10450, Government employee grand jurors not employed in "sensitive" jobs were not freed thereby from bias or fear. The Order itself has not been amended subsequent to that decision. The Government has announced that it supports legislation to continue the coverage of all employees, whether or not in sensitive jobs, within the security program. Furthermore, the Government employee whose job may not be classified as a security position may nevertheless reasonably anticipate the possibility of having a change in duties at any time which would subject him to the Executive Order. Under these circumstances, it is immaterial whether or not any of the grand jurors who were Government employees may at the time of this indictment have been technically, temporarily outside the coverage of the program by virtue of the decision in the *Cole* case.

** That fear generated by the loyalty and security program has been increased and accelerated by the enactment of such laws as the Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. 781, the

10. If the court will grant defendant a hearing pursuant to Rule 12(b)(4) of Federal Rules of Criminal Procedure, we expect to prove by examination of the grand jurors and otherwise that the grand jurors employed by the United States have known or heard:

(1) About relatives, friends or fellow workers who were kept under surveillance, investigated, suspended or dismissed under the loyalty and security programs;

(2) That many such persons were investigated, suspended or dismissed by reason of associations or actions which occurred in the distant past, or which were of short duration, or were infrequent or purely casual;

(3) That many such persons were investigated or suspended or dismissed by reason of actions or associations, not of their own, but of close associates, including relatives;

(4) That many such persons were investigated, suspended or dismissed by reason of actions or associations which bore little real relation to security.

11. We will further prove:

(1) That the net effect of these facts, known to [fol. J] the grand jurors, has been to create a climate of opinion, fear and intimidation among government employees that they would jeopardize their tenure or their job opportunities or provoke investigation by reason of any opinion or action or association which could be considered as evidencing the slightest sympathy with, or lack of hatred for, Communism or any other left-wing ism, including a vote against an indictment for refusal to answer questions concerning membership in the Communist Party;

McCarran-Walter Immigration Act, 66 Stat. 181, 8 U.S.C. 1181, the Communist Control Act of 1954, Public Law 637, 83rd Cong., 2d Sess., the Compulsory Testimony Act, Public Law 600, 83rd Cong., 2d Sess., the Bail Jumping Act, Public Law 603, 83rd Cong., 2d Sess., and the Harboring of Criminal Act, Public Law 602, 83rd Cong., 2d Sess.

(2) That these fears have been affirmed and strengthened by the almost daily press reports of the harsh and unjust operation of the loyalty and security programs;

(3) That this climate of opinion, fear and intimidation has affected personally those grand jurors employed by the United States so as to prevent their exercise of free will in voting on this case.

12. Affiant has personal knowledge that, during formal hearings under Executive Order 10450, persons under investigation have been asked their opinions of cases, such as the *Alger Hiss, Remington, Coplon* and *Rosenberg* cases, involving alleged Communist associations. If the mere opinions of persons who have not even participated in a case thought to affect the security of the government are treated by the authorities as relevant to a decision on security or loyalty status, the grand jurors would recognize that a vote against an indictment in this case would be harmful to their security status.

13. Affiant has personal knowledge that during formal hearings under Executive Order 10450 persons under investigation have been asked their opinions of Congressional investigating committees. The grand jurors would [fol. K] recognize that a vote against indictment of a person who had been cited by such a committee as contemptuous would be harmful to their security status.

Joseph L. Rauh, Jr.

Subscribed and sworn to before me this 10th day of December, 1956.

Mary C. Asay, Notary Public.

[fol. L] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Holding a Criminal Term

[Title omitted]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT OR FOR PRELIMINARY HEARING—Filed December 10, 1956

1. *Failure of Indictment to Allege Material Elements of the Offense*

The indictment against defendant is indistinguishable from that in the case of *United States* v. *Lamont*, 18 F.R.D. 27 (S.D.N.Y., 1955), wherein Judge Weinfeld dismissed contempt of Congress indictments on the grounds, among others, that:

> "to validly charge a defendant with a violation of § 192 of Title 2, the indictment must plead the following essential elements: (1) that the committee before which the alleged refusal to answer occurred was duly empowered by either House of Congress to conduct the particular inquiry, setting forth the source of this authority; (2) that the inquiry was within the scope of the authority granted to the committee."

In an opinion of the Court of Appeals for the Second Circuit, rendered on August 14, 1956, Judge Weinfeld's decision on these grounds was affirmed. 23 Law Week 2087.

As to (a), *failure of the indictment to allege the source of the authority, if any, by which the subcommittee was acting or the nature and scope of such authority*, a reading of all the Acts, Resolutions and Rules included in the first paragraph of the indictment, all of which may be judicially noticed by this Court, shows that there is no grant anywhere [fol. M] therein of any power or authority to, nor in fact any mention of, a "Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, of the Committee on the Judiciary

of the United States Senate." The allegation of the indictment that the Subcommittee was holding hearings "pursuant to" these Acts and Resolutions is self-defeating, for they confer no authority on any such Subcommittee. Here, as in the *Lamont* case, "One vainly examines the Public Law and Senate Resolutions set forth in the indictment to find any reference to the . . . Subcommittee, let alone any delegation of power to it" (18 F.R.D. at 34). For the reasons stated and the authorities cited by Judge Weinfeld, in the present case, as in *Lamont*,

> "If the Government contends, as eventually it must to sustain a conviction, that . . . [the Subcommittee] . . . was a duly authorized committee and engaged in conducting an investigation within the scope of delegated authority, whether it be a resolution of the Senate or the parent committee, should be alleged in the indictment" (18 F.R.D. at 33).

As regards point (b), *that the indictment omits a material allegation that the question under inquiry was within the scope of the authority granted to the Subcommittee*, this point is also governed by the *Lamont* case. *Cf. United States* v. *Rumely*, 345 U.S. 41. The reasons and authorities for this requirement are treated at length in Judge Weinfeld's opinion and in a Note, *Criminal Procedure—Contumacy of Witness Before Congressional Subcommittee—Sufficiency of Indictment Brought Pursuant to 2 U.S.C. § 192*, 24 George Washington Law Review 342.

As regards point (c), *the failure of the indictment to state the nature of the "question then under inquiry"*, this failure, when taken with the complete absence of any allegation from which defendant may determine the nature and [fol. N] scope of the authority of the Subcommittee before which he was called, renders it impossible to prepare a defense to the indictment. It is not discernable from the indictment how the questions set forth therein, such as "Did you ever have any conversation with a Mathilda Landsman?" or "What did you tell them (your employers)?", could be related to any legitimate Congressional inquiry. Perhaps such questions can be related to some legitimate "question then under inquiry"; perhaps the in-

quiry could be related to some authority granted to the Subcommittee; but the indictment leaves these matters to mere guesswork.

As stated by Judge Weinfeld (18 F.R.D. at 35):

> "The cornerstone of the Government's case in any prosecution under § 192 must be a lawfully constituted committee engaged in an inquiry within the scope of its authority when the refusal to answer occurred. This is the hard core of its case against the defendant and he is entitled to have it pleaded in the indictment."

Defendant challenged the jurisdiction of the Committee at his hearing, as he challenges it here. The indictment having failed to state the nature of the "question then under inquiry"; that "the question then under inquiry" was within any grant of authority to the Subcommittee; and what, if any, be the nature, scope or occasion of any grant of authority to the Subcommittee, either by the Senate or by its parent committee, it is manifestly impossible for defendant to prepare his defense. In the present posture of the case he cannot know how the questions he refused to answer might be pertinent to the question "under inquiry" before the Committee, nor how that question, whatever it may have been, falls within the authority, whatever it may be, of the Subcommittee. Under these circumstances, the indictment fails to allege material elements of the offense with sufficient particularity, so as to enable defendant to prepare his defense.

[fol. O] 2. *Bias and Prejudice of Grand Jurors*

Petitioner is entitled to a fair and impartial grand jury (*Cassell* v. *Texas*, 339 U.S. 282), acting as a "responsible tribunal." *Beavers* v. *Henkel*, 194 U.S. 73, 84. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis* v. *United States*, 339 U.S. 162, 171-172; *Morford* v. *United States*, 339 U.S. 258, 259.

Although this Court in *United States* v. *Emspak*, 96 F. Supp. 1010, *aff'd.* 91 U.S. App. D.C. 378, 203 F. 2d 54, and the related cases, denied a motion to dismiss or hold a hearing based on the presence on the grand jury of employees of the United States and its decision was affirmed

by a divided Court of Appeals sitting *en banc*, the Supreme Court granted petitions for certiorari in *Quinn* v. *United States*, 374 U.S. 1008, and *Bart* v. *United States*, 347 U.S. 1011, on the issue, among others, of the validity of the indictments returned by a grand jury which included government employees and the wives of government employees. Although the Supreme Court's disposition of the *Emspak*, *Quinn* and *Bart* cases did not require it to reach the grand jury questions raised (see *Quinn* v. *United States*, 349 U.S. 155, 170; *Emspak* v. *United States*, 349 U.S. 190, 202; and *Bart* v. *United States*, 349 U.S. 219, 223) the issue is again pending before the Supreme Court in the case of *Watkins* v. *United States*, 233 F. 2d 681, *cert. granted*, October 8, 1956.

Furthermore, unlike the affidavit attached hereto, the affiants in support of the motion to dismiss in the *Emspak* and related cases did not set forth and offer to prove, as they are set forth in the affidavit herein, (1) the net effect of the long operation of the government loyalty-security programs, in the years preceding and subsequent to the [fol. P] *Emspak*, *Quinn*, and *Bart* cases; (2) that attitudes of grand jurors in cases involving allegations of Communism would be considered relevant by security administrators; (3) that there was actual fear on the part of grand jurors that would prevent the exercise of their free will.

In view of the divided and uncertain decision of the Court of Appeals in the *Emspak*, *Bart* and *Quinn* cases on the grand jury issue, the differences between the affidavit and offer of proof herein from those made in *Quinn* and the related cases, and the present pendency of the question before the Supreme Court in the *Watkins* case, we urge this Court to grant the motion to dismiss or, in the alternative, a preliminary hearing at which the actual bias of the grand jurors could be shown.

Respectfully submitted,

Joseph L. Rauh, Jr., John Silard, Attorneys for Defendant, 1631 K Street, N. W., Washington 6, D. C.

December 10, 1956

[fol. Q] [File endorsement omitted]

[fol. R]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Criminal No. 1215-56

UNITED STATES OF AMERICA,
v.
ROBERT SHELTON, Defendant.

Washington, D. C.

Transcript of Proceedings—Friday, December 21, 1956

The above-entitled matter came on for hearing before the Honorable Alexander Holtzoff, United States District Judge, on motions to dismiss indictment, or for a preliminary hearing; for a bill of particulars at 10 o'clock a.m.

APPEARANCES:

On behalf of the Government: William Hitz, Assistant United States Attorney.
On behalf of the defendant: John Silard, Esq.

[fol. S] PROCEEDINGS

The Deputy Clerk. The case of United States v. Robert Shelton, Criminal No. 1215-56.

Mr. Silard. If Your Honor please, this is a contempt of Congress case, one of a group of cases pending in this District Court.

The question we raise as to the sufficiency of the indictment is of first impression in this jurisdiction, but it has been conclusively determined by Judge Weinfeld in the Second Circuit whose determination was affirmed in the Second Circuit in United States v. LaMont, the determina-

tion being that an indictment in a contempt case which fails to set forth the authority of the committee before which the alleged contempt is said to be committed and fails to set forth the question of the inquiry by the committee and was in the authority of the committee is a deficient indictment.

The Court. The Court of Appeals held the other way, did it not?

Mr. Silard. Not to my knowledge, Your Honor.

There was a third aspect of Judge Weinfeld's opinion which the Deutch case in the Court of Appeals did not follow.

The Court. Suppose you tell me first, which you have not done, what are the defects that you claim to be found in this indictment.

Mr. Silard. Yes, Your Honor.

[fol. T] In the first paragraph of the indictment, there are set forth certain Senate resolutions and public laws which the indictment states to be the authorizing laws and the language of the indictment is it was conducting hearings pursuant to these public laws and resolutions. Your Honor can take judicial notice of the contents of these resolutions and find nowhere in these resolutions or public laws there is any authority granted, nor even mention made of the committee before which the contempt is said to have been committed. In other words, on its face, the indictment is faulty because the authority from which the committee is pursuing its hearing is found not to be contained within that authority.

The Court. This sounds to me like a voice out of the past when an indictment was scrutinized with a magnifying glass and, if a comma was omitted, the defendant would go scot free. We have changed all that in 1946 when we adopted the new rules.

This indictment gives you sufficient notice as to what the defendant is charged with so that he can prepare for the trial.

Mr. Silard. But the indictment says the committee was holding hearings pursuant to these laws and resolutions and the reading of the laws and resolutions shows there is no mention of such committee. In other words, there is either an error or patent omission.

[fol. U] The Court. You can look it up. These are matters of public record.

I think this indictment, so far as this particular objection is concerned, sufficiently apprises the defendant of what he is charged with so that he can prepare for trial and so that if he should be prosecuted for the same offense on another occasion, he can plead double jeopardy.

Mr. Silard. May I add just one word, Your Honor. I have searched the public records and I have not found any public record, outside of the statute and resolutions cited, which even mention any such committee before which the contempt is alleged.

The Court. I know, but there is general authority for committees to appoint subcommittees.

Mr. Silard. That is true, Your Honor. I made the mistake in arguing this motion in skeleton form. It is really one problem for the defendant which Judge Weinfeld has discussed at length, and that is this: He is told he failed to answer questions pertinent to the question under inquiry but he is not told, and this is my second objection, what the question under inquiry was nor, in this case, told what the authority of the committee before whom he appeared was. In other words, he does not know what the question under inquiry was. He is not told that the question under inquiry was one authorized nor given any citation to the [fol. V] authority under which the committee was acting. In other words, we are in the dark here.

The Court. You do not have to cite law in an indictment or in any pleading, for that matter.

Mr. Silard. It is Your Honor's contention that it is mere surplusage in the first paragraph to recite these laws and resolutions since they are of no aid to the defendant and, as Judge Weinfeld has said and been affirmed, and I might say Judge Cecil held similarly in the Metcalfe case in Ohio and our memorandum attached to our motion cites that the very gist of the offense is failure to answer questions pertinent to a question under inquiry which is an authorized inquiry and within the authority of the committee.

The third aspect and the third defect which we allege, Your Honor, is that the question under inquiry is not stated in the indictment.

The Court. You said all of that once.

Mr. Silard. Second, it is not alleged that the question was within the authority of the committee and, thirdly, it is not alleged nor is anything alleged from which we may derive what the authority of the subcommittee was.

I would like to ask Your Honor if he feels that the indictment is nevertheless sufficient, to consider the possibility of a bill of particulars so that we may know before trial what authority this committee presumed to exercise, what [fol. W] the scope and nature of the grant of that authority was and what the nature of the inquiry was, because as of now we stand helpless to know what these questions were pertinent to, what the inquiry was, who authorized the inquiry, and what the scope of the authority of the committee was.

The Court. Mr. Hitz.

Mr. Hitz. Your Honor, the indictment sets out the authority for this committee to act; most particularly, Senate Resolution 366 is the resolution of Congress which expands very slightly the authority which was given to this committee, that is, the Committee on the Judiciary by the Reorganization Act of 1946. This special resolution is one which gives this committee or any duly authorized subcommittee the authority to make investigations for legislative purposes in the field of subversive activities. That can, of course, be obtained by anyone who is interested in it from the Senate of the United States.

We cite it and it can be obtained. That will, of course, outline the authority of this particular committee.

We state in the indictment that the Internal Security Subcommittee, briefly put, was the body of the Judiciary Committee which was conducting the particular hearings under the resolution which gave these powers to the full committee and, when we state in the fourth line that this subcommittee of the full committee was conducting hear- [fol. X] ings pursuant to the authority which created this power in the committee, we are, of course, stating that they were conducting hearings which properly were before that committee. That is the conclusion, of course, from what we have stated here.

When we state that the questions which were refused of answer were pertinent to the inquiry which was being conducted, we are, of course, stating these were proper questions and that it was before an inquiry which was authorized by the resolution.

The Court. Defense counsel's point there is that you do not state what the inquiry was about.

Mr. Hitz. That is right.

The Court. What do you say about that?

Mr. Hitz. That is a matter of fact that will come out at the trial and the proof. He is not entitled to have it in advance because the authority that this subcommittee was acting under is found in the resolution which I have already referred to, and there is no particularly defined inquiry less than the full authority to which this committee was restricted at this particular hearing.

The Court. I notice that Count 1 attempts to indicate that the subject of communism was being inquired into. Does the resolution creating the committee and the subcommittee authorize the subcommittee to investigate communism?

[fol. Y] Mr. Hitz. Not in so many words. In general, it does.

The Court. The subject was within the general jurisdiction?

Mr. Hitz. Yes. It comes in part 3 of the resolution which states, "the extent, nature and effects of subversive activities in the United States" and so forth. That, of course, embraces communism.

Let us assume that the particular inquiry at the moment might have been subversive activities in the field of education. That does not limit and does not restrict the full authority that was granted to this committee by the resolution and, therefore, the committee, through this subcommittee, could make all inquiries that were authorized by it to make. For the defendant to know what particular inquiry may have been uppermost in the minds of the committee, without restricting its general authority, would be of no help because the pertinency of the question asked would be as broad as the authority which the committee had, and that is stated in the resolution itself which may

be obtained, so that we say not only is the indictment sufficient as it stands to charge the offense, but it is sufficient, without further particularization, to inform the defendant of the charge that he must meet and to protect him from a second prosecution.

Thank you.

[fol. Z] Mr. Silard. May I say one more word, Your Honor.

I am not sure that Mr. Hitz and I really understand each other on this problem. The resolutions and public laws cited do not mention any subcommittee, that the indictment pleads, before which the contempt was committed. Are we to assume that all the authority granted in the public laws and resolutions was at some unspecified date and manner passed on to a subcommittee of the Judiciary Committee? I might say Fisheries and a lot of jurisdictions are included in the public laws. This is not just an idle problem here, Your Honor. The Senate Resolution 366, which is cited, grants broad jurisdiction of three specific sorts to the Judiciary Committee, not to any subcommittee. How do we know, and we do not know whether the subcommittee was granted all the authority.

The Court. That is a matter of evidence, is it not?

Mr. Silard. That is the authority which the Government will have to claim was being exercised and we are not told the very vital gist of the offense.

The Court. The burden will be on the Government to prove that the subject matter was within the jurisdiction of the subcommittee, and, if the Government does not succeed, the prosecution will fail.

Mr. Silard. It does seem to me, sir, if I might perhaps make this idle remark, that to set out the resolutions and [fol. AA] public law that are set out are more surplusage and of no particular help to us because to know what the parent body was but not to know the subcommittee is really to know nothing. That is the gist of our argument.

Judge Weinfeld reviews the authorities at great length and I saw no point in adding to our memorandum on the subject and, as I mentioned, Judge Cecil held similarly in the Metcalfe case.

The Court. The Court is of the opinion that the indict-

ment is sufficient. It must be borne in mind that the test of the sufficiency of an indictment, under the present simplified reformed procedure, is twofold. Does the indictment apprise the defendant of the specific charge that he has to answer? There is no doubt that the indictment meets this test.

The second test is: Would the indictment sufficiently protect the defendant in pleading double jeopardy if an attempt was made to prosecute him again for the same offense? This indictment meets that test also.

The decisions prior to 1946, which required some specific allegations of a technical character in indictments for various offenses, are no longer good law. They are outmoded and we try to get at the merits of cases.

MOTION TO DISMISS INDICTMENT DENIED

The motion to dismiss the indictment is denied.

Mr. Silard. May I ask Your Honor whether we must [fol. BB] file a formal motion for a bill of particulars or whether your denial also relates to that?

The Court. I am not going to pass on an informal request for a bill of particulars unless the Government consents that the matter be handled that way, because the Government is entitled to notice of such an application and is entitled to give it consideration.

Mr. Hitz. I will waive written notice of the bill of particulars, if Your Honor would care to hear it orally from counsel.

The Court. I shall be glad to hear it.

Very well, I will hear your application.

Mr. Silard. The request of the bill is for the same information as the first point of our motion to dismiss, that is, for the specific authority under which the subcommittee was said to be conducting hearings and, secondly, for the nature of the question under inquiry before said committee.

The Court. What do you say about that, Mr. Hitz?

Mr. Hitz. The resolution, No. 366, provides in two places for the duties of the full committee which were authorized by this particular resolution to be carried on by any duly authorized subcommittee thereof.

In that sense, I am supplying at this moment the authority for the subcommittee named in the indictment to carry [fol. CC] on the purposes of the full committee contained in the resolution.

We will prove, at a later time, the transfer of the authority contained in this particular resolution from the full committee to the subcommittee.

As to the second asking, the Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.

This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose so that, in that sense, the asking No. 2 of counsel will be supplied by his reading the resolution.

The Court. It seems to the Court that the Government has supplied the bill of particulars orally.

Mr. Silard. Except in this one sense: that I asked, in my motion to dismiss—perhaps I didn't do it well—the nature and scope of the grant to this committee. That has not been given to us.

MOTION FOR A BILL OF PARTICULARS DENIED

The Court. I think it has been sufficiently given.

I will deny the motion for a bill of particulars in view of the fact that the oral statement just made by counsel for the Government will be sufficient compliance if the motion were granted. You have the particulars.

(Thereupon the hearing was concluded.)

[fol. DD] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. EE] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Criminal No. 1215-56

[Title omitted]

ORDER DENYING THE ORAL MOTION FOR A BILL OF PARTICULARS —December 21, 1956

On this 21st day of December, 1956, came the attorney of the United States; the defendant by his attorney, John Silard, Esquire; whereupon the oral motion of the defendant, for a bill of particulars, coming on to be heard, after argument by counsel, is by the Court denied.

By direction of Alexander Holtzoff, Presiding Judge, Criminal Court #1, Harry M. Hull, Clerk, By C. J. Rumsey, Deputy Clerk.

Present: United States Attorney, By William Hitz, Assistant United States Attorney, J. Rawls, Official Reporter.

[File endorsement omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 1215-56

UNITED STATES OF AMERICA,

—vs.—

ROBERT SHELTON, Defendant.

Washington, D. C.

Transcript of Proceedings—Monday, January 14, 1957

The above-entitled cause came on for trial before the Honorable Ross Rizley, a District Court Judge, at 10:00 a. m.

APPEARANCES:

William Hitz, Esq., Assistant U. S. Attorney, for the Government.

Joseph L. Rauh, Jr., Esq.; John Silard, Esq., for the Defendant.

[fol. 4] PROCEEDINGS

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Criminal No. 1215-56, United States v. Robert Shelton.

What says the Government?

Mr. Hitz: The Government is ready.

The Court: What says the defendant?

Mr. Rauh: The defense is ready, sir.

The Court: Do you want a jury in this case?

Mr. Rauh: No, sir, we waive the jury, and we have agreed with Mr. Hitz that we will waive the jury.

The Court: Very well. Let me dispose of the jury here, if I may.

Ladies and gentlemen of the jury, the parties in this case have waived a jury: it will be tried by the Court. I think that so far as this Court is concerned, I will have no more jury cases to try. I believe I mentioned that tomorrow my assignment will be a non-jury assignment of civil matters.

I want to say to you, ladies and gentlemen of the jury, that I appreciate very much your services here during the two weeks we have been working together. I congratulate you on the fine attention you have given to these lawsuits. There is no higher duty of citizenship, there is no greater privilege than being able to serve as members of a petit jury.

I wish all of you the best of everything for the ensuing new year. It is altogether likely that I wouldn't be seeing [fol. 5] you very soon. My assignment here is only for a month. Thank you very much for your services, and you will report to the jury lounge, because I expect some of the other judges may need your services. Thank you.

You may proceed, Mr. Hitz.

Mr. Rauh: Your Honor, there is a preliminary matter, unless Mr. Hitz intended to explain it.

We have issued a subpoena to the Clerk of the Senate Internal Security Committee returnable this morning at 9:30. I do not see the Clerk, and so far as I know, Mr. Hitz has made no suggestion to quash the subpoena. Therefore, we have checked, and personal service was made upon the Clerk. The documents we requested are relevant to the very initial stages of the case. I have no further light to shed on this matter. In one previous case I have tried with Mr. Hitz, he has shed some light on the subpoena I had served. I don't know, maybe he can shed some light on this.

Mr. Hitz: I have no information about the service of the subpoena or the fact that it was served or anything else about it, Your Honor. I can say this, that there were subpoenas served upon certain employees of the subcommittee and of the full Judiciary Committee and on the Clerk of the Senate in another case. In that case we propose probably to take the action of moving to quash. It may be that

the persons that were served by Mr. Rauh in this case got [fol. 6] the two confused and postponed appearance until we did move to quash. That could be.

The Court: Well, we had better find out before we proceed.

Mr. Rauh: I would appreciate that, sir.

The Court: Mr. Marshal, will you check up on the witness who was subpoenaed and see what has happened?

Mr. Hitz: Your Honor, Mr. Sourwine, who, as you know, is the counsel for the subcommittee and who usually is in close touch with happenings of the subcommittee, is here today. He said he never heard of the subpoena, and presumably he would have heard of it last Friday or this morning.

The Court: What does the record show about the service of it, Mr. Rauh? Does the record show it was served?

Mr. Rauh: Yes. We have just checked this morning with the Marshal's office, and the Marshal's office informs us it was personally served on Dotty Baker, clerk of the subcommittee.

The Court: As of when?

Mr. Rauh: Thursday afternoon, sir.

The Court: I see. Well, we will find out before we proceed.

You have no information about it, Mr. Sourwine?

Mr. Sourwine: No, Your Honor, I have not.

I was told by Mrs. Baker on Thursday that she had re- [fol. 7] ceived the expected subpoena in the other case that Mr. Hitz has mentioned. That is the only information that I have.

Mr. Rauh: Is it all right if Mr. Silard goes with the marshal, because he just checked downstairs a few minutes ago, and he could find the man he checked with and might speed it up?

The Court: Yes, I think it might, but I think we will withhold here for a little while, because we probably wouldn't want to start to try the case and then find we didn't have the witness who was subpoenaed as a proper witness.

Mr. Rauh: I would appreciate it if we could recess until this is straightened out.

(Whereupon, a short recess was taken.)

The Clerk: All witnesses in this case, that is, witnesses on both sides, follow the marshal to the witness room.

The Court: Is Mrs. Baker here?

Mrs. Baker: Yes, I am.

The Court: Mrs. Baker, the records of this case show you were served with a subpoena last Thursday, to be in court at 9:30 this morning.

Mrs. Baker: I received this Friday, and I thought it was just one subpoena, and there are two.

The Court: Either Thursday or Friday.

What is your excuse for not being here under the [fol. 8] subpoena?

Mrs. Baker: I looked at it, and there is one for Seymour Peck at 10:00 o'clock, and I just assumed this was wrong. There are two of them.

The Court: Of course, you understand the courts have a lot of business to transact, and if we have to wait after the time to start, and we were delayed a little bit by the weather this morning anyhow, we can't transact the business expeditiously. I am going to excuse you this time, but I want you to understand a subpoena from the United States District Court is important and it is not to be ignored by anyone, even though they may be an employee of the United States Senate or the House of Representatives, and I have had some experience myself serving there. Do you understand that?

Mrs. Baker: Yes, sir.

(All witnesses were excluded from the courtroom.)

The Court: Are you ready to proceed, Mr. Hitz?

Mr. Hitz: Yes, I am, Your Honor.

The Court: Very well.

Oral Motion to Quash Subpoena

Argument in Support of Motion

Mr. Hitz: Your Honor, I would like to make an oral motion to quash this subpoena. It is oral for the reason that I have not had sufficient notice to prepare a written motion [fol. 9] to quash. I am prepared to argue it, and I can sub-

mit to the Court, if the Court would care to have it, a memorandum and a motion in a similar case. I, of course, hesitate to do that because it isn't captioned in this case, and there are certain variations in the facts and the applicable law between that case and this one. So I would prefer to make it an oral motion.

The Court: As far as the Court is concerned, I am perfectly willing to hear you on an oral motion. You can state your grounds, of course, and what you expect to supplement the record with. I take it you will supplement the record with a written motion.

Mr. Hitz: Yes, I will, Your Honor.

The Court: Very well.

Mr. Hitz: Your Honor, this subpoena calls for "all records, files, memoranda, documents, or other writings, relating to Robert Shelton," end of quotation, and I am now summarizing it, which were in the possession of the subcommittee at the time that Mr. Shelton actually appeared before the subcommittee on January 6, 1956, from which appearance he was cited for contempt, and that is the case to be tried.

It is clear from the nature of this subpoena that the confidential documents of the committee, and perhaps even of the Senate itself from other committees but in the possession of this committee, would not be excepted from [fol. 10] this subpoena. In fact, it is very likely that it is precisely that information which the defendant now seeks to obtain in answer to the subpoena, for the very obvious reason that anything that is public could be obtained by him either from purchasing it in printed form from the Government Printing Office or on leave from the committee itself. So that it is confidential material that would be embraced within it and possibly nothing but that.

The Senate has a rule, Rule No. 36, Part 4, which states as follows:

"Any Senator or officer of the Senate who shall disclose the secret or confidential business or proceedings of the Senate shall be liable, if a Senator, to suffer expulsion from the body and, if an officer, to dismissal from the service of the Senate and punishment for contempt."

The Court: The Court is familiar with that rule.

Mr. Hitz: Your Honor, of course, is well aware that this lady could not respond to this subpoena without being released from the penalties of that rule. It would be necessary for her to have a resolution passed by the Senate permitting certain of the material sought to be produced in court by her. However, it is the practice of both Houses [fol. 11] of Congress that material which is not public material, even though it not be surrounded by any confidential safeguards, will be produced on a subpoena of a court by an employee of either the Senate or the House only if there has theretofore been made a finding by the court that that material is material to the trial of a lawsuit before the court, a preliminary finding of materiality.

In addition to that, the law in the Supreme Court and in the various circuits, and it has been affirmed and reaffirmed in this circuit, is that a subpoena duces tecum which does not call for evidentiary material may be quashed by the Government upon whom it is served. That doctrine was announced in the Bowman Dairy case and it has been followed uniformly in the District Courts and in the circuits since. So that, not only to comply with the rule of the Senate, so as to protect the person who is possessed of this material, but also to protect the Government generally from subpoenas which are really fishing expeditions, it would be necessary in order to enforce a subpoena, whether it be upon the legislative branch or upon someone else, in the face of a motion to quash, that the information sought, the documents sought, be evidentiary.

Now, of course, evidentiary means that it is admissible or probably admissible in the trial of the particular case. I am now coming to this conclusion which I would like [fol. 12] Your Honor to follow me in and to adopt, and that is that there is no issue in this case upon which the information sought here would be material. If it is not material, it would not be admissible on behalf of the defendant. If it is not admissible, it is not evidentiary. If it is not evidentiary, the Bowman Dairy case says that a motion to quash the subpoena will prevail over the subpoena.

Now there are certain issues in this case which I know will be presented by the counsel for Mr. Shelton upon

which it will be claimed that this material sought from the committee would be admissible and, therefore, evidentiary and therefore enforcible. We do not believe that to be true. First of all, let us take the matter of the legislative purpose of the hearing.

The law on that subject, announced first in the case of McGrain *v.* Dougherty, is that where the Congress, through one of its committees, is making an investigation in a subject that is open generally for the action of Congress to legislate on, and where the particular committee that seeks to make the investigation is authorized by Congress to enter that field, that a legislative purpose in fact for the particular sessions and the particular investigation will be presumed. That doctrine has been followed many times in this district, in this circuit. There has never been a departure from it. It was most recently—I wouldn't say most [fol. 13] recently, but in a recent Circuit Court opinion in this circuit, the Morford case, our Court of Appeals not only announced again this doctrine of presumption of legislative purpose, but quoted from McGrain v. Dougherty, or cited it, on the theory that the Supreme Court had spoken on this subject and had never departed from that doctrine.

I am well aware, of course, that it has frequently been sought on behalf of defendants situated as is this defendant to assert to the trial court and to the appellate courts that the particular hearing before which he committed his alleged contempt was in fact being conducted without a legislative purpose, and that efforts have frequently been made to show that exposure, blacklisting and other motives of that sort were really the most important and perhaps the sole reason for him being called before the committee and being asked the questions that were asked.

Your Honor, I am sure, is aware of the numerous cases in which the defense of exposure to attempt to rebut the presumption of legislative purpose has been rejected by the courts. It was rejected in the Dennis case, I believe. It was rejected, I am certain, in the Lawson and Trumbo cases and in the Morford case, all in this circuit.

I have so far been discussing whether or not material in the hands of the committee would be admissible on be-

half of the defendant on the question of legislative purpose. [fol. 14] I say that it is not material to that issue.

The Court: Let me ask you this. Some questions, of course, upon the face of the record in these cases, without further explanation or without additional testimony, would be sufficient, but some of the questions may be asked where it is necessary to supplement by way of evidence as to whether the committee really had jurisdiction to go into that particular question or under the first amendment. You would put testimony on here, I take it, if there were some questions that would not upon their face indicate contempt. You would put on some additional evidence to show the reason for asking that question. Why wouldn't the defendant have a right to know what that testimony is?

Mr. Hitz: Well, I can answer that by giving an example from this particular indictment. One of the counts is the question, "Do you know Matilda Landsman," I think.

The Court: Yes, that is what I had in mind. Count 2, for instance, says, "Did you ever have any conversations with Matilda Landsman?" The way I look at it now, that question, within itself, would have to have some additional proof to show its pertinency.

Mr. Hitz: Yes, it would. That is not pertinent on its face, and we would offer proof.

The Court: Very well.

Mr. Hitz: With respect to that, we would offer this proof, [fol. 15] and I assume that it is not improper for me, even though it is a matter that will come up in the case, to mention it by way of illustration, and may I do so?

The Court: You may do so.

Mr. Hitz: We will offer proof that Matilda Landsman was a member of the Communist Party who had certain instructions with respect to attempting to infiltrate into the linotype part and duties of the newspaper field, that she was given special instructions to do so, and she became skilled enough to obtain that sort of work. If we can show that, we can show that it would be material to the purposes of this subcommittee to find out if there was any connection between her and the defendant, who, when he appeared as a witness before the committee, was suspected of having been a member of the Communist Party.

The Court: That is the point exactly. You not only would show, Mr. Hitz, that she was engaged in this sort of work, but I would think the Court would want you to go a little further than that, to show that the defendant knew that she was engaged in that sort of work.

Mr. Hitz: Oh, yes. And then we get back to the question, and the question is, "Did you have a conversation with her," and that would be the beginning, then, of an investigation of any connection between the two of them, and finally, were they conspirators in the same—

[fol. 16] The Court: Yes, that is exactly right. Of course, you can prove that by what I would say is hearsay evidence, so to speak, that she was a communist or was engaged in this work and also that the committee had information that the defendant knew that she was engaged in this work. Now you can prove that part of it by hearsay. But if you had information up there before the committee, if you had some documentary evidence of some kind, if the committee had some documentary evidence up there of some kind showing the facts, wouldn't the defendant be entitled to have that documentary evidence?

Mr. Hitz: You mean—

The Court: In other words, maybe the Government might put the wrong interpretation on it; maybe it is subject to two interpretations. Wouldn't the Court have a right to see it for the purpose of determining the interpretation that was being put on it by the Government, or whether there is some interpretation they might put on it, and wouldn't it be the Court's duty then to make the determination?

Mr. Hitz: I don't think so. If there is a prima facie showing, so to speak, of the material that was before—

The Court: Yes, prima facie showing, but, of course, there has got to be a prima facie showing or you wouldn't have a case, but any defendant is entitled, isn't he, to [fol. 17] defend against a prima facie showing? Suppose you had a document up there. Suppose you had a prima facie showing of some kind that the Government had certain information. On the other hand, you had some other evidence up there to the effect that the defendant didn't know anything about this woman. Wouldn't he be entitled to that record down here in his defense?

Mr. Hitz: I think not, and I wonder if I could answer by way of illustrating it further on the facts Your Honor supposes. Let's assume that the committee had information that I had mentioned concerning Matilda Landsman. Your Honor has already conceded, as necessarily the law now makes it so, that it can be hearsay. That was stated by Judge Holtzoff and adopted by Judge Bastian in the Circuit Court in the Barenblatt case.

Now if the committee was also possessed of information diametrically opposite to that, let us say an affidavit from somebody who knew Miss Landsman and was able to say that to his positive information of long-standing acquaintanceship with her she had never engaged in those activities, and let us go one step further and say that Miss Landsman had not only appeared before the committee, but had testified fully under oath that she had never engaged in those activities, we believe the information that the committee had that she had engaged in those activities would permit [fol. 18] the committee to seek whatever information it could do so in order to check whether she was in those activities or was not, because she may well have decided to take the risks of perjury in denying it. It may well be that the person who gave the affidavit stating she was not in that activity would be willing to take the risks of perjury. But if the committee had sufficient information so that it seemed reasonable to make the inquiry, I think that no matter what was in the possession of the committee contrary to that would still allow them to proceed along the line, if it was reasonable to start with. In other words, no matter what the committee might have, no matter what might result from this shotgun subpoena, if the committee was possessed of the information leading to a likely connection between Miss Landsman as a member of the party in the New York area and Mr. Shelton—

The Court: Supposing she wasn't a member of the party in the New York area?

Mr. Hitz: Then that would test the truth of what the committee had information about.

The Court: That is right. But doesn't this Court have to determine on some sort of evidence whether she was a communist in the New York area?

Mr. Hitz: No.

The Court: You don't mean to stand there and tell the Court that I am going to find somebody guilty of contempt [fol. 19] where the witness is asked, have you ever had any conversation with a certain person, and they refuse to answer and then it is determined that that person was lily-white, never had anything to do with the Communist Party in any shape, form or fashion. Why would you say that was a contemptuous question; how could you?

Mr. Hitz: If the committee had reason to believe that she were not lily-white and was a member of the Communist Party conspiracy—

The Court: I will concede that the committee had a right to go ahead on that theory. But doesn't the Court have a right to know, before he gets through; doesn't the Court have a right to have the ultimate facts? Does the defendant have a right to defend against that?

Mr. Hitz: I think not, Your Honor. I think the answer to that is in the negative, for the very reason that hearsay testimony is permitted upon this subject. Now if the truth and the accuracy of the information that our witness will testify the committee had concerning Miss Landsman—if the truth of that were at issue, no court, and I am sure Your Honor would not permit hearsay testimony to go in on the subject, and that is precisely what Judge Holtzoff said, which was quoted by the Circuit Court here: We are not interested in the truth of it. We are interested in the reasonableness of it even as hearsay.

[fol. 20] Let me give an illustration, the same one that Judge Holtzoff gave, by the way. Suppose a search warrant based upon a prima facie showing of probable cause resulted in a successful search and contraband was obtained. If it should develop at any time that the information upon which the probable cause was based and upon which the search warrant was issued turned out to be false, the United States Commissioner or no court would quash the search warrant and return the property.

The Court: That I agree with one hundred percent. But suppose it turns out that it wasn't contraband?

Mr. Hitz: Then nobody is hurt.

The Court: As far as the search is concerned, that is true, but suppose what they found was finally determined to be not contraband?

Mr. Hitz: Well, as I say, I don't see what issue would be raised or who would complain.

The Court: The thing I am trying to get at, Mr. Hitz, on the question of probable cause, I will agree with you that you can use hearsay to prove that, but on this question of probable cause, can't the defendant dispute that in any way, shape, form or fashion?

Mr. Hitz: I think not. I think it is strictly one-sided and ex parte, certainly a search warrant is. Now if a search warrant is based upon the information of a confidential [fol. 21] informant, which is frequently the case, whether that ultimately turns out to be true or not isn't at issue.

The Court: I understand, I agree with you on that, but the question of whether the defendant is guilty of contempt might be.

Mr. Hitz: Well, we liken the two situations, Your Honor, and if the committee had a right to make the inquiry, the witness has a duty to answer, whether he be innocent or not. If he is innocent, let him make the answer.

The Court: Maybe you are right.

Mr. Hitz: So say that upon the showing we can make here, that will be nothing for the defendant with respect to pertinency beyond the face of the question. There hing that the defendant can rebut. That is the second e that could arise in the case. First, I have mentioned t egislative purpose or lack of , which the defendant will a sert, and we say that there is no room for the introduction of defense evidence contrary to the presumption of legislative purpose, and here we say on pertinency that a prima facie showing by hearsay testimony of a member of the staff of the committee is enough to support the connection or supposed connection or arguable connection between the question asked and the duties of the committee. We need not show pertinency between the question asked and the defendant, because he can be lily-white and an innocent person, and as Your Honor is well [fol. 22] aware, pertinency is tested not by the likely information to come from the particular witness, but comes

from the pertinency of the question itself. In other words, a pertinent question can be asked of an innocent witness.

The Court: Let's hear what the defendant has to say.

Mr. Hitz: I do have another point, Your Honor.

The Court: Very well.

Mr. Hitz: I know of no other factual issue upon which it could even be argued that the information in the hands of the committee is material to the defense. But over and above that, there is a second ground for the quashing of this subpoena. I have mentioned already the one that if the material is not evidentiary, the subpoena can and may be quashed upon motion. Second of all, it has always been held that a subpoena which is really a fishing expedition, to obtain information that the defendant doesn't even know exists anywhere, much less in the hands of the committee, that that subpoena will be quashed merely because it is a fishing expedition.

The Court: Let me see a copy of the subpoena that was issued, will you, please, sir?

Mr. Hitz: We say this subpoena should be quashed as a fishing expedition.

[fol. 23] The Court: You may proceed.

Mr. Hitz: And for one further reason, too, that in this and in any other case, it is likely that enforcing a subpoena of this sort, which is a fishing expedition, will likely result in revealing confidential informants of the committee. That has been uniformly held to be a reason not to enforce a subpoena.

And finally, there is the point that we cannot urge too strongly here; we do not urge it too strongly, but it is one that will point up the importance of the issue that is raised, and that is the confidential character of the information sought in the hands of the legislative branch. And I think that the Court should move very carefully, as I am sure this Court will, in considering the possibility of enforcing a subpoena against the legislative branch. If the Court should decide to enforce a subpoena of this sort and if the legislative branch should decide that the matter is of such importance, either as a matter of principle or because the particular confidential information in the hands of the committee is more important than the prosecution

of the case, an issue might arise here that would require the dismissal of this case.

I am sure that Your Honor will not approach that situation without giving full thought to the several reasons that I have mentioned here which have been upheld by the [fol. 24] courts on motions of this sort. I may say there have been numerous motions to quash subpoenas precisely like this in this jurisdiction, and every one has been granted, and I know of no jurisdiction where there has been a single decision honoring a subpoena of this sort in the face of a motion to quash. Thank you, Your Honor.

The Court: Mr. Rauh, I will hear you now.

Argument in Opposition to Motion

Mr. Rauh: May it please the Court, with all due deference to my learned and able opponent, there has never been a subpoena like this quashed in this District.

The facts which we will develop at the trial, and which I believe are not disputed, are these: A subpoena was issued to one Willard Shelton at the New York Times; that is, the subpoena was issued to one Willard Shelton, New York Times. When the investigator got to the Times, the man at the Times said, "There isn't any Willard Shelton here, but we got a few other Sheltons." And the investigator looked through the list of a few other Sheltons and he saw one in the news room. He says, "Well, I will talk to this fellow." So he talked to this fellow, and then he wrote in on the subpoena the name of the defendant.

The Court: Now let me see. Is it your contention that this defendant was never properly subpoenaed before the committee?

[fol. 25] Mr. Rauh: No, sir. Well, I shouldn't say no, sir. I am not making a technical defense on the subpoena. What our major line of defense will be, and I am not trying to get from the subpoena what Mr. Hitz thinks I am trying to get, a lot of confidential information—I am trying to prove, and maybe he will concede it, that at the time they called Mr. Shelton, the defendant, before the committee, they had no information whatever about him. In other words, I am not trying to fish for any information in those

files. I would be perfectly satisfied to take a stipulation from Mr. Hitz that there was in the files no evidence derogatory to Mr. Shelton prior to his calling and that this was really what Mr. Hitz is accusing us of—a shotgun subpoena: namely, it was erroneously issued, in the first place, to a wrong man and without any evidence that this was a man who had been in any way concerned with the communist movement or knew anything about it. It was changed over to this man and he was called before the committee, without any prima facie case or probable cause, and it is for that purpose that we ask for this material. Therefore, I suggested it might have been wiser—I didn't want to interrupt, but it might have been wiser if I had spoken first so that Mr. Hitz's remarks could have been directed at what we were trying to show, rather than at very vague arguments.

What we want to show through the subpoena, Your [fol. 26] Honor, and I think it is very material, very evidentiary—I will concede, if it isn't evidentiary, of course, we shouldn't have it enforced, but it seems to me highly evidentiary to prove that at the time this man was called before an executive session of a committee, they had no derogatory information about him and that he was called there by accident.

The Court: But Mr. Hitz says it didn't make any difference. In other words, he said, we can't go into that, whether they had any derogatory information or not, that their determination of asking the questions is sufficient. Is that the way I understood you, Mr. Hitz?

Mr. Hitz: Yes, sir.

The Court: Of course, this subpoena here, Mr. Rauh, is a Mother Hubbard subpoena.

Mr. Rauh: You can only find out a negative by subpoenaing all the things that are in the positive, and I believe the answer to this is, and Mrs. Baker could testify to this if she would make a search of her files, that there was nothing in the files as of the time he was initially called.

Now let me make one point very clear, if Your Honor please. The Government has no right to withhold from us something because it is confidential. They may have the right to drop the prosecution, but the cases are perfectly

clear, and we can call Your Honor's attention to them, that when the Government comes into court against a [fol. 27] defendant, the fact that there is something confidential that would be helpful to the defendant isn't a ground for withholding that. The Government has a choice. It can either come into court and prosecute and give us the information we need for our defense or it can drop the prosecution. The cases are clear on that, and I really understood Mr. Hitz to say that if you ruled this was material, they would then have to consider that aspect of the case. So that isn't really before you.

What is before you at the moment, and what seems to be the dispute between Mr. Hitz and myself, is whether it is material to be able to show that at the time the defendant was taken before a committee of the Senate, there was no information available to that committee in any way reflecting upon that defendant, and I would say that that is both a violation of the fourth and fifth amendments. It is an absence of probable cause. It was a restraint on the defendant in absence of probable cause and, secondly, it constitutes an arbitrary action.

The Court: Of course, counsel, since we have been talking about it specifically, if the Government in this case, specifically on Question 2: "Did you ever have any conversation with Matilda Landsman?" shows they had no information of any kind or character that Mr. Shelton had ever heard of Matilda Landsman, had no information of any kind or character that this defendant had ever been in any way connected with Matilda Landsman, you need not [fol. 28] have much trouble as far as this Court is concerned as to what would happen to that indictment, or to that count of the indictment, because I think it is necessary, Mr. Hitz, for the Government to prove more than just that naked question, I mean, I would think so, and I have so held, as you well know, myself, recently.

RULING OF THE COURT

The Court: But I don't think we need discuss this any longer. I would have to sustain the motion. I think this Mother Hubbard subpoena, as I would call it, is too much Mother Hubbard. It calls for too many things that, of

course, this Court wouldn't require, and if it is confidential, I am going to sustain the motion to quash this subpoena, and we will see what develops as far as the Government's testimony is concerned.

Mr. Rauh: If Your Honor please, simply for purposes of the record, is this ruling that proof of the absence of evidence or knowledge against the defendant at the time the subpoena was issued is not material?

The Court: I didn't say that.

Mr. Rauh: Because I know of no other way to prove they had none except to subpoena what they did have.

The Court: I didn't say that. What I said was if the only proof they had was that they asked this question and were relying upon the question itself as being contemptuous [fol. 29] as far as this defendant is concerned, and there is no proof offered by the Government that they had any information of any kind or character whatsoever in respect to this defendant and in respect to the relation with this Matilda Landsman, why, the Government will probably lose the case on Count 2. I haven't ruled yet, but that is the way I feel about it.

Mr. Rauh: This subpoena, sir, was directed at all three counts.

The Court: Yes, I understand it is.

Mr. Rauh: It was directed at proving that they had no information whatever at the time they called—

The Court: Of course, the same thing would probably be true on Count 3: "What did you tell them, your employers?" I don't know what that means without some additional proof. As to Count 1—I don't know what the record is going to show—but as to Count 1, if the record shows what they usually do in this case, I think it would be pertinent.

Mr. Rauh: But, sir, it is exactly to Count 1 that this subpoena is addressed, to show that they had never heard of this defendant at the time they subpoenaed him, and they got him by accident. This is our one chance of proving, if Your Honor please, that the subpoenaing of this man was an accident, that their files were barren at the time that they called him, and this question which Your Honor feels

[fol. 30] may be pertinent on its face was the same as if they had called the man off the street.

The Court: I have sustained the motion to quash.

Mr. Hitz: Shall we proceed, Your Honor?

The Court: You may proceed.

Mr. Hitz: It is my understanding this would be the commencement of the trial at this time—

The Court: That is right.

Mr. Hitz: —the other being a preliminary matter?

The Court: That is right.

Mr. Hitz: I have an extra copy of the indictment, if Your Honor would care to have it as a work sheet.

May I make a brief opening statement of fact, Your Honor?

The Court: Yes, sir.

OPENING STATEMENT BY THE GOVERNMENT

Mr. Hitz: As the indictment states, the witness appeared before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Judiciary Committee of the Senate, commonly known as the Internal Security Subcommittee, which was holding hearings in Washington on January 6, 1956, and that he was asked certain questions that were pertinent to the purposes of that committee, as stated in Resolution [fol. 31] 366, which I need not at this point go into because Your Honor, I am sure, recalls that from another case. We will, of course, offer it in proof so that it is in the record. But, roughly, that subcommittee had the power and the duty to inquire into subversive activities in this country, to determine the scope, the source, and so forth, of those activities.

Now, Mr. Shelton was told to appear before the committee on January 6, 1956, after he had already appeared in an executive session in New York before the same subcommittee on December 7, 1955.

When he appeared in New York, he was asked certain questions concerning his own Communist Party activities and other matters dealing with subversive activities generally in the New York area. He refused to answer all such

questions about himself and other persons. He answered only certain questions concerning his earlier background and education. When he was asked the questions that were of interest to the committee under their resolution, he not only refused to answer, but he announced certain reasons for doing so, and he timed his refusals to answer in such a way that it was apparent to the counsel for the committee and to the committee indeed, as it will, I think, appear from the record itself when we read it, that he was possessed of certain information of interest to the committee along this line.

[fol. 32] I mention that not because I think that it has to be shown that the particular witness was believed to be in the possession of that sort of information, for the reason I believe the resolution is sufficiently broad and the purpose of the resolution is sufficiently important to the nation and to the national security that any question pertinent to those purposes, to preserve the form of government that we have, to put it very briefly, and to determine what measures can and should be taken against those who seek to overthrow that form of government, is so important that any question that is pertinent to that subject could be asked of anyone at all, even the most innocent person, as it developed or as it started, and could be asked of anybody whose identity was even unknown to the committee. I may say, to use the language of Mr. Rauh, that a man off the street could be called off the street and asked, "Are you one of the persons that we have a duty to protect this country from?" and if the person was, he should either answer or make a refusal to answer based upon some legal justification.

Now, we say that only with respect to a pertinent question. We don't think that a person off the street could be called in and asked, "What are your political beliefs?" But we think that there is no reason why anyone couldn't be asked, "Are you a member of the Communist Party?" and "Tell us what you know about it."

[fol. 33] So I say that the proof that we will offer here that the committee had some reason to believe from the executive testimony that this person was possessed of information that it would be to the interest of the committee

to again try to obtain, as it did by calling him again, is proof beyond the necessities of this case: since we have had proof in the case, we are going to offer it, and we are going to, from that, contend that the committee had reason to ask these pertinent questions of this particular witness, although, we say, to repeat it, we think they could be asked of anyone.

We also contend in this case that how the witness got before either the executive session in December in New York or how he got before the committee in the session in Washington, from which the trial here stems, is of no importance, for the reason that the statute, after condemning a default by anyone who has been subpoenaed to comply with the order of the committee, after stating that it would be a default for someone who has been summoned to appear before the committee, then goes on and says, "or anyone who having appeared refuses to answer questions pertinent to the purposes of the committee shall be in contempt."

So that the second clause under which we are prosecuting this case only has to do with a person who appears, and we say no matter how he gets on the stand. Indeed, it has often happened that someone from the audience, having [fol. 34] been recognized by the committee or its staff or for some other reason it is decided to call him up to the stand, has been put on the stand and asked questions, and he has no reason to complain that he wasn't subpoenaed. So when Mr. Shelton appeared on January 6th before the committee, his duty was to answer questions that were pertinent, no matter who he was. If that be true, of course, then why he was summoned to appear in the executive session before that in New York is, likewise, immaterial, so long as the committee desired answers to questions that might result in information along the line of their resolution.

I may say that Your Honor will never probably find presented to him for decision a case of contempt where the committee did not have some reason to call the person as a matter of fact, although we say as a matter of law it is unimportant, for the very good reason that the committee doesn't have time to investigate the conspiratorial connec-

tions and subversive activities of everyone. Their time is more than consumed with respect to those about whom they do have information.

In this case, too, there was reason for the committee to have subpoenaed Mr. Shelton to appear before the executive session in New York, and we can show that, although we feel we do not have to. Since it has been mentioned, I will state now that there was very good reason to call Mr. [fol. 35] Shelton before the first of these two sessions, but even if there were not reason to call him before the second one, it would have been supplied by the first appearance that he, indeed, did make. But we can go beyond that. The committee was possessed of information that there was a man, last name Shelton, who was employed by a newspaper called the New York Times, in New York City, who had been a member of the Communist Party and was at the time of the information. It was as a result of that, as a matter of fact, that the time of the committee was taken up to obtain the testimony and the appearance of the defendant in this case. But whether or not there was sufficient reason to have called him the second time from his appearance on the first time, and even if there was not, we say that if we can prove these questions to be pertinent, that could be asked of him or anyone else.

With respect to the second and third counts, we will offer evidence beyond the face of the questions themselves to prove pertinency. I have already indicated what we will show with respect to Matilda Landsman. Now a person situated as was Matilda Landsman, with the supposed training and capabilities that the committee was informed she had and was given, with respect to such person, anyone who might know her and her activities and might have discussed the activities with her, or indeed have had any conversation with her, would be a person in whom the committee could well be interested and concerning whom the [fol. 36] question could be asked, even though it hadn't been shown there was a connection between Matilda Landsman and that particular person.

We go further than that in our proof in this case, however, because the information in the hands of the committee, as I have already indicated, was that Mr. Shelton was

a member of the Communist Party in the New York area, as was Matilda Landsman. We say, I again repeat, although we don't have to show it, that we can show from that that there was a sufficiently close connection between the two by reason of membership in this conspiratorial organization, so found by the legislature, that the committee would be derelict in not asking that witness that information concerning Miss Landsman, although it never had heard they had communicated. The committee is trying to find that out. Indeed, to carry the argument of Mr. Rauh further, he would limit the committee to asking questions only concerning which they had ten percent, fifteen percent, maybe even fifty-one percent information already at hand. We say that is untenable and it is an unreasonable restriction on the important powers of Congress. Thank you, Your Honor.

The Court: Mr. Rauh, do you want to make a statement now?

OPENING STATEMENT BY THE DEFENDANT

Mr. Rauh: I would only say, if Your Honor please, that [fol. 37] our contention is not that they have to have information on particular questions, but that they have to have some information about the man, and that I find it, if I may say so, with due deference to counsel, rather depressing to feel that it is the Government's position that a man could be hauled off the street and asked about his past. I don't believe that can be done, and we are going to try to show that is what was done here, and that that is unlawful.

The Court: Call your first witness.

Mr. Hitz: Mr. Sourwine.

Marshal, ask him to wait outside; I have something to take up first.

OFFERS IN EVIDENCE

Your Honor, I think I will offer the formal documents at this time, before the witness appears. My first offer is a copy of Senate Resolution 366, 81st Congress, which is the resolution creating the powers that have been mentioned

for either the Judiciary Committee or the subcommittee. I offer that as Government 1.

Mr. Rauh: We have no objection to the entry, although we do not put the interpretation on it that Mr. Hitz just did in his statement.

Mr. Hitz: We understand.

The Court: Has it been marked as Government Exhibit 1?

Mr. Hitz: It is now.

[fol. 38] The Court: It will be admitted.

(Government Exhibit 1 was marked and received in evidence.)

Mr. Hitz: Would you mark this Government 2?

(Government Exhibit 2 was marked for identification.)

Mr. Hitz: I now offer Government 2, which is Senate Resolution 58 of the 84th Congress, which is a resolution that provides the formality of authorizing the Judiciary Committee or a subcommittee of it to expend certain funds to carry out the purposes of Resolution 366 of an earlier Congress. It is that formal document.

Mr. Rauh: We have no objection.

The Court: It will be admitted as Government Exhibit 2.

(Government Exhibit 2 for identification was received in evidence.)

Mr. Hitz: The next is Government No. 3 for identification, which is a copy of a committee resolution, the Judiciary Committee resolution, continuing for the 84th Congress the special subcommittee that I have already named here, commonly called the Internal Security Subcommittee.

The Court: Any objection, Mr. Rauh, to Government Exhibit 3?

Mr. Rauh: I don't believe I have an objection. I have [fol. 39] never had a chance to see this before.

The Court: Take what time you need. Do you need more time to examine it?

Mr. Rauh: I would like to examine it more, sir.

The Court: Go ahead.

Mr. Rauh: We have no objection.

The Court: Exhibit 3 will be admitted.

(Government Exhibit 3 was marked and received in evidence.)

Mr. Hitz: Next is Government 4 for identification, which is a statement of the persons appointed by the Judiciary Committee to comprise the Special Committee on Internal Security, which is the one in issue in this case, the appointment being in February, 1955.

The Court: That is, assigning certain members of the committee?

Mr. Hitz: Certain members of the Judiciary Committee to this subcommittee, yes, Your Honor.

The Court: Very well, it will be admitted.

(Government Exhibit 4 was marked and received in evidence.)

Mr. Hitz: Next is Government No. 5 for identification, which is the certification by the President of the Senate, actually the Vice President of the United States, of the resolution of the Senate which cited Shelton for contempt. [fol. 40] the certification being of that fact to the United States Attorney. Attached to the certification is a copy of the Senate resolution which ordered the certification of the contempt to the United States Attorney, and attached to that resolution is a copy of the Judiciary Committee report, reporting the facts of the contempt to the full body of the Senate, but, nevertheless, it is one document that we offer, because they are all attached to each other.

Mr. Rauh: We have no objection.

The Court: It will be admitted.

(Government Exhibit 5 was marked and received in evidence.)

Mr. Hitz: Now I am ready to call my witness, if Your Honor will permit it.

Mr. Rauh: If Your Honor please, the announcement of witnesses may be required. I have a witness whom I have never seen, and if he was in the courtroom, I would be in the position of not knowing it. So possibly the clerk

would want to make the announcement again in case there is somebody here. I notice there are two strangers, and I thought one might be the witness I have asked to come later.

The Clerk: Do you have his name?

Mr. Rauh: Halleck.

The Court: Are there any witnesses in this case in the courtroom other than Mr. Sourwine?

[fol. 41] (No response.)

Thereupon JULIAN G. SOURWINE was called as a witness by and on behalf of the Government, and after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hitz:

Q. Mr. Sourwine, state your full name, please.

A. Julian G. Sourwine.

Q. Your occupation, sir?

A. I am a lawyer.

Q. Have you had duties with the staff of the Internal Security Subcommittee of the Senate, being a subcommittee of the Judiciary Committee?

A. I have.

Q. Over what period of time and what were the duties, sir?

A. I served as chief counsel of that subcommittee for a number of years prior to the end of January, 1956. I resigned at that time and returned to the staff of the subcommittee as associate counsel October 1, 1956.

Q. And you are presently with the committee, are you, sir?

A. I am.

[fol. 42] Q. I have a document here, Mr. Sourwine, which has been identified as Government Exhibit No. 4 in evidence, which states that the following persons were named by the Judiciary Committee to comprise the Internal Security Subcommittee, so-called, on February 7, 1955—

please have in mind the date—those persons being: Senators Eastland, Johnston, McClellan, Hennings, Daniel, Jenner, Watkins, Welker and Butler.

Was February 7, 1955 the commencement of a new session of Congress, the 84th Congress?

A. No, sir. The session had commenced before that. It was close to the beginning of the new session.

Q. Do you have knowledge of the duration of the term of a Senator on a particular committee or subcommittee, with reference to the first and second parts of the session of Congress? Do you have such knowledge? Just answer you do or do not.

A. Yes, sir, I do.

Q. When a Senator is appointed to a committee in the first session of a Congress, does that appointment last, other things being equal, through the second part of the same session?

A. Yes, sir.

Q. Was the appointment of these persons I have named here from this Document No. 4, in February 7, 1955, to [fol. 43] go through both parts of that Congress?

A. So far as I know, it was, sir.

Q. Was it the 84th Congress?

A. Yes, sir.

Q. And that lasts two years, does it?

A. Yes, sir.

Q. Both parts of a Congress?

A. Yes, sir.

Q. Mr. Sourwine, did you take part as the examiner for the committee in an executive session in New York City on December 7, 1955, at a time when the Subcommittee on Internal Security was conducting hearings there, at which time Mr. Shelton appeared?

A. Yes, sir.

Q. Does the report of the Judiciary Committee, being Report No. 1934 of the 84th Congress, contain the executive testimony of Mr. Shelton in December, 1955, in executive session?

A. Yes, sir.

Q. As Annex 1?

A. Yes, sir.

Q. And is Annex 2 the testimony of Mr. Shelton on January 6, 1956 in Washington, D. C.?

A. Yes, sir.

Mr. Hitz: Would you give that the next number?

[fol. 44] (Government Exhibit 6 was marked for identification.)

OFFER IN EVIDENCE

Mr. Hitz: Your Honor, I have asked the clerk to mark as Government Exhibit No. 6 for identification the Report No. 1934, which has just been described in my last questions of Mr. Sourwine. That is the same report which is one of the attachments to the certification to the United States Attorney from the President of the Senate, but I am offering it again in this form so that it will be more easily read and available.

The Court: I understand.

Mr. Rauh: We have no objection.

The Court: It will be admitted.

(Government Exhibit 6 for identification was received in evidence.)

By Mr. Hitz:

Q. Mr. Sourwine, prior to the appearance by Mr. Shelton before the subcommittee on December 7, 1955 in New York, did the committee, to your knowledge, its subcommittee or its staff, to your knowledge, have any information concerning the witness Robert Shelton; if so, what was it?

A. The committee had information that a man by the name of Shelton, employed on the New York Times, was in a position probably to give the committee information with respect to communist activity.

[fol. 45] Q. Did the information go to any participation by himself in those activities?

A. Yes, sir.

Q. Will you state what it was?

A. The information the committee had was that this man named Shelton was a member of the communist group in the New York Times.

Q. By communist group, did that information have any relationship to the Communist Party, Mr. Sourwine?

A. The committee did not have a direct statement that this man was a member of the Communist Party, no, sir.

Q. But a member of the communist group at that location?

A. Yes, sir.

Q. Where was that location stated to be? You mentioned the New York Times, but New York Times in what city?

A. The New York Times in New York City, sir.

Q. As a result of that information, did the committee make efforts to obtain the presence before it of the man named Shelton employed by that paper?

A. Yes, sir.

Q. What efforts were made, sir?

A. The committee caused a subpoena to be issued. Do you want the whole story here?

Q. Yes, sir.

[fol. 46] A. The subpoena was issued in an erroneous name. The subpoena was issued for one Willard Shelton. There is a Willard Shelton that has since been ascertained that he was not the man the committee wanted. The committee's employee who went to New York to serve the subpoena, along with other subpoenas, soon ascertained that there was no Willard Shelton employed on the New York Times. He was told that there was a Robert Shelton employed and that Robert Shelton was the only employee of the New York Times on the editorial side. We knew the man we wanted was on the editorial side.

Q. You had that information prior?

A. On the news side, yes, sir. He was instructed, thereupon, to call upon Robert Shelton, since he was the only Shelton on the news side, as presumably the man we want and to ask him to come down and testify before the committee.

Q. Was a subpoena given to Robert Shelton?

A. Yes, sir.

Q. And afterwards, and as a result of that, did Robert Shelton appear in the executive session of December 7, 1955 in New York City?

A. He did.

Q. Have you had occasion to read the testimony that is given in Annex 1 of the committee report citing Shelton for the date December 7, 1955?

A. I have read it, sir.

[fol. 47] Q. Is it substantially accurate, as you recall those proceedings?

A. Yes, sir.

Q. Would you be good enough to read to us what took place at that session, sir?

Perhaps I should clear one thing up first. Did the information that you had concerning an employee on the editorial side of the Times in New York City state what his first name was?

A. No, sir.

Q. Only the last name?

A. Yes, sir.

Q. All right, now would you read the executive session, please?

A. Do you want the preliminary matter, or shall I begin reading with the first statement by the Senator?

Q. State, first of all, who was present of the committee and then read the testimony.

A. (Quoting):

"Present: Senators Hennings and Jenner.

"Also present: J. G. Sourwine, chief counsel, and Benjamin Mandel, research director.

"Senator Hennings. You do solemnly swear that the testimony you are about to give at these hearings will be [fol. 48] the truth, the whole truth and nothing but the truth, so help you God?

"Mr. Shelton. I do.

"Senator Hennings. Be seated, Mr. Shelton.

"Mr. Sourwine. Will you give the reporter your full name, sir?

"Mr. Shelton. Robert Shelton.

"Mr. Sourwine. Do you have a middle name or initial?

"Mr. Shelton. No, I have not.

"Mr. Sourwine. And your address?

"Mr. Shelton. 191 Waverly Place, New York 14.

"Mr. Sourwine. And your business or profession?

"Mr. Shelton. I am a copy editor for the New York Times.

"Mr. Sourwine. You say a copy editor or the copy editor?

"Mr. Shelton. A copy editor.

"Mr. Sourwine. How many copy editors are there, sir?

"Mr. Shelton. Oh, I believe there are about 60.

[fol. 49] "Mr. Sourwine. How long have you been employed there, Mr. Shelton?

"Mr. Shelton. It will be 5 years in February.

"Mr. Sourwine. Where did you work before that, sir?

"Mr. Shelton. Prior to that I worked with Fairchild Publications.

"Mr. Sourwine. For how long?

"Mr. Shelton. About three months.

"Mr. Sourwine. And before that?

"Mr. Shelton. I was not working in the newspaper field. I was working for a mail-order house for a few months. Prior to that, unemployed; prior to that, going to college.

"Mr. Sourwine. Are you a college graduate, sir?

"Mr. Shelton. Yes.

"Mr. Sourwine. What college?

"Mr. Shelton. Northwestern University.

"Mr. Sourwine. Your degree?

"Mr. Shelton. Bachelor of science.

"Mr. Sourwine. You graduated in what year?

"Mr. Shelton. 1950.

"Mr. Sourwine. Where were you born?

[fol. 50] "Mr. Shelton. Chicago, Illinois.

"Mr. Sourwine. Did you live there in Chicago before and after the time you graduated?

"Mr. Shelton. The last two years of college I resided in Evanston, Illinois, which is a suburb of Chicago.

"Mr. Sourwine. Were you at any time active in the Newspaper Guild?

"Mr. Shelton. Is that question pertinent to the scope of this inquiry?

"Mr. Sourwine. I may say what we are primarily doing here is clearing up a question of identity and one way to do that is to make the record clear about yourself and your own associations.

"Mr. Shelton. I understand that. That is a matter of public record; that I have been a member of the Newspaper Guild.

"Mr. Sourwine. For how long, sir?

"Mr. Shelton. Well, I joined the guild when I was at Fairchild Publications; that would be some time in the winter of 1950."

Q. May I interrupt, Mr. Sourwine, please?

It was stated two questions before that you were making an effort to clear up a question of identity. Can you state [fol. 51] in any more detail now what the purpose of that question was, sir, concerning identity?

A. Well, we were not sure that we had the Shelton that we wanted.

Q. For the reasons you have already mentioned?

A. Pardon?

Q. For the reasons you have already mentioned?

A. Yes, sir.

Q. All right, will you continue now, without omission?

A. (Quoting):

"Mr. Sourwine. For how long, sir?

"Mr. Shelton. Well, I joined the guild when I was at Fairchild Publications; that would be some time in the winter of 1950.

"Mr. Sourwine. You were not then with the guild in 1947?

"Mr. Shelton. No; I was a college student then.

"Mr. Sourwine. Were you ever Washington correspondent for PM or in any way connected with PM?

"Mr. Shelton. No, sir.

"Mr. Sourwine. And you are not a member of the Communist Party and you never have been; is that right?

[fol. 52] "Mr. Shelton. I have a brief statement I would like to introduce at this point, if I may.

"Senator Hennings. Do you care to read it, Mr. Shelton?

"Mr. Shelton. Yes, I would.

"Senator Hennings. Of course, that is not responsive to the question. I think first you had better—

"Mr. Sourwine. This is an executive session.

"Senator Jenner. Let him read it.

"Mr. Shelton. I am a loyal American who believes in and firmly supports the Constitution of the United States. Because of that strong belief in the Constitution, I am forced to say that this inquiry raises serious doubts in my mind.

"I must ask this question: Is an inquiry into the beliefs and associations of a citizen forbidden by the first amendment to the Constitution? That amendment says that:

> "'Congress shall make no law * * * abridging the freedom of speech or of the press or of the right of the [fol. 53] people peaceably to assemble * * *.'

"Several weeks ago the venerable scholar, Prof. Alexander Meiklejohn, testified before the Senate Subcommittee on Constitutional Liberties. He said in part:

> "'* * * no subordinate agency of the Government has authority to ask, under compulsion to answer, what a citizen's political commitments are. The question, 'Are you a Republican?' or 'Are you a Communist?' when accompanied by the threat of harmful or degrading consequences, if an answer is refused, or if the answer is this rather than that, is an intolerable invasion of the 'reserved powers' of the governing people. And the freedom thus protected does not rest upon the fifth amendment 'right' of one who is governed to avoid self-incrimination. It expresses the constitutional authority, the legal power, of one who governs to make up his own mind without fear or favor, with the independence and freedom in which self-government consists.'

"Therefore, gentlemen, in asking me, 'Am I, or have I ever been, a member of the Communist Party,' or 'Have I any knowledge of Communist activity or conspiracy in the

newspaper field or elsewhere,' I feel that, however unknowingly or unwittingly, you are infringing on my rights under the first amendment.

"The question I feel to be even further a violation of the first amendment because of my profession as a news- [fol. 54] paperman. Freedom of the press is a broad right and a broad philosophy. It belongs not only to the publishers of newspapers and periodicals, but also to everyone in this country. It especially belongs to anyone connected with writing or editing what will appear in print. Thus, an inquiry into the beliefs and associations of a newspaperman is by direct connection an inquiry into the press and a threat to the freedom of the press as guaranteed under the first amendment.

"One of the reasons I was attracted to the New York Times as a newspaper to work for is the philosophy under which it operates. It is a credo that many papers in this country would be happy to call their own. Adolph S. Ochs, assuming the ownership of the Times, wrote in a signed editorial on August 19, 1896:

> "'It will be my earnest aim that the New York Times * * * give the news impartially, without fear or favor, regardless of any party, sect or interest involved * * *,—

and further,

> "'nor will there be a departure from the general tone and character and policies * * * unless * * * to intensify its devotion to the cause of * * * no more gov- [fol. 55] ernment than is absolutely necessary to protect society, maintain individual vested rights and assure the free exercise of a sound conscience.'

"Speaking not for the Times, but as an individual newspaperman who supports these statements by Mr. Ochs, I must say that the committee's summoning of me to inquire into my associations and beliefs substantially affects my role as a subeditor in passing upon stories for publication in a daily newspaper.

"'Fear and favor' are the key words here. I am placed in fear of having my loyalty considered suspect and being

faced with legal and economic penalties if I do not, while freely exercising my sound conscience, answer this committee's questions. I am obliged to seek the favor of this committee to guard my personal integrity and the integrity of the newspaper profession in general and the organization for which I work, in particular.

"The twin evils of fear and favor do not apply to me alone. They would apply also if this body were to summon a writer or editor of a newspaper that advocated white supremacy and expressed condemnation of the Supreme Court's ruling on desegregation. An inquiry into the be-
[fol. 56] liefs and associations of such a person would, I feel, also be an invasion of freedom of the press.

"On the basis of these considerations, I must respectfully arrive at the conclusion that this inquiry is a violation of my rights under the first amendment to the Constitution in respect to freedom of speech and of the press and peaceable assembly.

"Furthermore, the inquiry is beyond the scope of the committee.

"Senator Hennings. In that event, having read your statement into the record, Mr. Shelton, are we to assume that your objection goes to the entire inquiry or to the question which has been put to you?

"Mr. Shelton. The actual basis for the inquiry has not been stated to me, nor does it appear on the subpoena.

"Senator Hennings. I understood you to say that you considered this inquiry to be an invasion of your rights?

"Mr. Fraenkel: Certainly insofar as this particular question is concerned."

Q. Would you pardon me. Who is Mr. Fraenkel?

[fol. 57] A. Mr. Fraenkel is an attorney who had appeared at the hearing as counsel for the witness.

Q. Thank you. Will you read, without omission?

A. (Quoting):

"Senator Hennings. That is what I wanted to get at, whether it is the question.

"Mr. Fraenkel. As to whether other questions—certain questions have been asked and have been answered.

"Mr. Sourwine. Counsel has not been identified; if he is going to testify for the witness, let's have his name.

"Senator Hennings. Give your full name and office address.

"Mr. Fraenkel. Osmond K. Fraenkel, 120 Broadway, New York.

"Senator Hennings. Thank you. Counsel was interrupted in the course of making his statement.

"Mr. Fraenkel. As to whether any other questions would be answered would depend on the character of the questions.

"Senator Hennings. So the record may reflect the circumstances as they actually are, do we understand that Mr. Shelton refuses to answer the question that counsel has [fol. 58] put to him upon the grounds which he stated in the statement?

"Mr. Shelton. That is correct.

"Mr. Sourwine. That ground is the first amendment and the jurisdiction of the committee.

"Mr. Shelton. That is correct.

"Mr. Sourwine. I believe, Mr. Chairman, that the committee must refuse to accept the first amendment as a ground for refusing to answer the question and that the committee also cannot endure a direct challenge to its jurisdiction and the witness should be instructed to answer the question.

"Senator Hennings. The witness at this time is instructed and directed to answer the question.

"Mr. Shelton. I stand on my statement.

"Senator Hennings. The record will so reflect.

"Mr. Sourwine. I will state, Mr. Chairman, I am greatly surprised. I did not expect this. We came into this as I explained to the Senators and to put on the record to clear up a question of identity. The record will show that the witness was not charged with being a Communist. Counsel said you are not a Communist and you never have been; [fol. 59] isn't that right?

"Mr. Fraenkel. Obviously that involves—

"Mr. Sourwine. The question does, of course, involve the answer, but I must admit to the chairman, I am taken by surprise.

"It may be that we shall have to question this witness more at length later. I would like to ask just a couple of questions now because of the statement which has been made.

"Senator Hennings. I might suggest to Mr. Shelton and to counsel that this committee here and now is not going to determine or undertake to determine the legal question which has been raised by this objection.

"Mr. Fraenkel. Naturally.

"Senator Hennings. And the refusal to answer the question. For the record, in order that the issue may be made, the witness has been asked and directed to answer the question and has refused to do so.

"Mr. Sourwine. Do you, sir, consider the Communist Party to be just another political party just like the Republican Party, which is the connotation in which you mentioned it?

[fol. 60] "Mr. Shelton. I wish to stand on the statement which I have made.

"Senator Jenner. Mr. Chairman, I respectfully request that the witness be ordered and directed to answer that question.

"Senator Hennings. The witness is so directed.

"Mr. Shelton. I stand on the statement that I have made.

"Mr. Sourwine. You mean you refuse to answer the question?

"Mr. Shelton. That's right; for the same reason.

"Mr. Sourwine. Because of your claim of privilege under the first amendment and your challenge to the committee's jurisdiction?

"Mr. Shelton. That's right.

"Mr. Sourwine. Are you contending that you wish to assert in any way your privilege under the fifth amendment to refuse to answer questions which involve testifying against yourself?

"Mr. Shelton. No, I do not.

"Mr. Sourwine. I am not suggesting that you do so.

[fol. 61] "Senator Hennings. You are standing solely upon the first amendment?

"Mr. Shelton. Yes.

"Mr. Sourwine. Don't you know, sir, that the Communist Party is an international conspiracy, that it is not just another political party?

"Mr. Shelton. I wish once again to stand on the statement and the reasons and things that were outlined in the statement.

"Mr. Sourwine. You mean you refuse to answer that question on the same grounds?

"Senator Jenner. I respectfully request that the witness be directed to answer the question.

"Senator Hennings. The witness is so directed.

"Mr. Shelton. I stand on the statement I made.

"Mr. Sourwine. Are you aware that the Congress of the United States and the courts of the United States have concurred in finding that communism is an international conspiracy and the Communist Party is a part of that conspiracy?

"(The witness consulted with counsel.)

[fol. 62] "Mr. Shelton. In addition to standing on my statement, I believe that this question is one that would require a lawyer to answer. I am a newspaperman; I am not a lawyer.

"Mr. Sourwine. Sir, you would not have to be a lawyer to answer that question, regardless of what counsel told you; it went only to your own knowledge. Newspapermen as informed laymen are frequently aware of other things in other fields, even specialized fields. Either you are aware of those findings by the Congress or the courts or you are not.

"We are simply establishing that fact, are you aware of those findings by the United States Congress or the courts of the United States that the Communist conspiracy is a worldwide conspiracy and the Communist Party is a part of that conspiracy?

"(Witness consulted with counsel.)

"Senator Hennings. The Chair might say to the witness the witness either knows or does not know. He may make no answer if he desires or he may say he does not know or he may state that he does know, to put it another way.

"Mr. Shelton. I have so read, so heard. However, I offer [fol. 63] no opinion.

"Mr. Sourwine. The committee does not require you be a conformist. We simply wanted to know if you know. Did you, sir, personally write your statement delivered here this morning?

"Mr. Shelton. Yes.

"Mr. Sourwine. Did you have any help in the composition or the writing of the statement?

"Mr. Shelton. I was advised by counsel.

"Mr. Sourwine. Did you consult in the writing of it with any other person than counsel?

"Mr. Shelton. Is that question pertinent to the scope of the inquiry?

"Mr. Sourwine: I will ask this question, if the Chair permits. I will make it a more direct question. I was dividing it into two parts. Did you consult in connection with your statement or seek or receive advice in the writing of it from any person known to you to be a Communist?

"Mr. Fraenkel. Repeat the question. I did not catch the last one.

"Mr. Sourwine. Read the question.

[fol. 64] "(Question read.)

"Mr. Shelton. The answer is 'No.'

"Mr. Sourwine. Do you know your present counsel to be a Communist?

"Mr. Shelton. I think that is a bit of a—I don't know what the ethics of the law profession are about this, but it would seem to me that you are impugning the respectability; you are impugning the reputation of my counsel by this question.

"Mr. Sourwine. This question goes to the credibility of the witness in connection with the next question.

"Mr. Fraenkel. I would resent the question very seriously.

"Senator Hennings. You what?

"Mr. Fraenkel. I resent that question. The witness has already said—

"Senator Hennings. Have you any further grounds as

to the reason why you apparently may object to the question?

"Counsel resenting a question is scarcely an objection under our procedures.

"Mr. Fraenkel. The witness has stated he does not consider the question pertinent, nor do I. I would advise [fol. 65] him, as his lawyer, that he is not obliged to answer such a question.

"Senator Hennings. Then you are advising him not to answer on the ground that the question is lacking in relevancy or pertinency?

"Mr. Fraenkel. That is right.

"Senator Hennings. The Chair might observe, sir, that it would seem to me rather difficult for you to determine as counsel or for this witness to determine what is relevant or what is pertinent to the subject matter of the entire inquiry.

"Mr. Fraenkel. The courts will have to determine that if the matter is put to that issue, sir.

"Senator Hennings. Then I take it Mr. Shelton does not see fit to answer that question.

"(Witness consulted with counsel.)

"Mr. Sourwine. He has not refused.

"Mr. Shelton. To be perfectly frank, I have had no reason to believe that my counsel is a member of the Communist Party. I think his standing and reputation as one of the country's leading constitutional lawyers is undisputed.

[fol. 66] "Mr. Sourwine. I made no challenge to the counsel's standing or reputation, nor to his legal ability. The question simply was whether you knew him to be a member of the Communist Party. Is your answer, 'No, you do not'?

"Mr. Shelton. Nothing has led me to believe that he is.

"Senator Hennings. Then will you be good enough to be responsive to the question, Mr. Shelton? You either do know that he is or you do not know whether he is or indeed you know that he is not.

"Mr. Shelton. I do not know whether he is or is not.

"Mr. Sourwine. I have no further questions.

"Mr. Fraenkel. Has no reason to believe.

"Mr. Shelton. I have no reason to believe that he is.

"Mr. Mandel. Were you a member of the Communist Party or a Communist youth organization prior to your employment in the New York Times?

"Mr. Shelton. I stand on my statement.

"Mr. Mandel. Did you obtain employment—

[fol. 67] "Senator Jenner. Wait just a minute. Mr. Chairman, I respectfully request that the witness be ordered and directed to answer that question.

"Senator Hennings. The witness has refused to answer that question.

"Mr. Shelton. On the grounds set forth in my statement.

"Senator Hennings. On the grounds set forth; that is to say, the protection afforded the witness according to his understanding of the first amendment and also the jurisdiction of the committee.

"Mr. Shelton. Yes.

"Senator Hennings. The witness is ordered and directed to answer the question.

"Mr. Shelton. I repeat that I refuse to answer the question on the grounds set forth in my statement.

"Senator Hennings. Very well.

"Mr. Mandel. Did you obtain employment with the New York Times with the aid of any Communist connections?

"(Witness consulted with counsel.)

"Mr. Shelton. The answer is 'No'.

[fol. 68] "Mr. Mandel. Do you know Matilda Landsman?"

Q. Excuse me, Mr. Sourwine. Tell us who Matilda Landsman was, to the information of the committee.

A. Matilda Landsman was an employee of the New York Times in the mechanical department, specifically, in the typographical department. The committee had information that Matilda Landsman was a member of the Communist Party and a party to a particular operation of that party which involved an effort to take over the Typographical Union in New York City.

Q. Did the committee, to your knowledge, have any information concerning any special training achieved by Miss Landsman?

A. Yes, sir. Miss Landsman had been a secretary; had resigned from that post; had taken a course of training of some six months as a linotype operator in Connecticut and had then returned to New York and with some waiver of apprenticeship requirements obtained a journeyman's card as a linotype operator.

Q. At what location?

A. In New York City. And she had resumed employment with the New York Times, this time in the mechanical department.

Q. Did you have information as to whether she was employed at the New York Times at any time when Mr. Shelton was?

A. Yes, sir. They were both employed there at the same time.

[fol. 69] Q. Was that information in the hands of the committee?

A. Yes, sir.

Q. Now, will you continue to read, without omission, please?

A. (Quoting):

"Mr. Shelton. I stand on the—

"(Witness consulted with counsel.)

"Mr. Shelton. I refuse to answer that on the grounds stated in my statement, the question being a violation of my rights under the first amendment.

"Senator Jenner. Wait just a minute. Let's keep the record straight. Mr. Chairman, I request the witness be ordered and directed to answer that question.

"Senator Hennings. The witness is ordered and directed to answer the question.

"Mr. Shelton. I stand on my statement.

"Senator Hennings. The witness refuses to answer upon the grounds stated heretofore, that is, his protection under the first amendment and his challenge to the jurisdiction of this subcommittee.

"Mr. Mandel. Do you know Matilda Landsman as a fellow member of a Communist cell at the New York Times?

[fol. 70] "Mr. Shelton. I stand on my statement.

"Senator Jenner. I request, Mr. Chairman, that the witness be ordered and directed to answer.

"Senator Hennings. The witness is again ordered and directed to answer the question.

"Mr. Shelton. Once again I stand on my statement.

"Mr. Sourwine. I have one final question. In the preparation of the statement which you read here today, did you consult with or seek advice from or receive advice from any person other than your counsel?

"(Witness consulted with counsel.)

"Mr. Shelton. A personal friend was asked for an opinion. He in no way had anything to do with drawing up the statement.

"Mr. Sourwine. Who is that?

"Mr. Fraenkel. I think this is going pretty far, Senator. I think that the witness should not be required to answer that question.

"Mr. Shelton. I accept full responsibility for what is in that statement as being my ideas and with the quotations there that I also endorse from Professor Meiklejohn [fol. 71] and from Adolph S. Ochs.

"Mr. Sourwine. I would like to have an answer.

"Senator Hennings. The witness is ordered and directed to answer the question.

"Mr. Shelton. Would you repeat the question?

"Mr. Sourwine. Yes. Who was this person whom you consulted other than your counsel?

"(Witness consulted with counsel.)

"Mr. Shelton. I believe this question is beyond the scope of the committee. And I, therefore, refuse to answer.

"Senator Hennings. The witness having been ordered and directed to answer the question refuses to answer the question on the grounds that this question is beyond the scope of this subcommittee's inquiry. Do I state your grounds accurately, sir?

"Mr. Shelton. That's right.

"Mr. Fraenkel. May I point out, the witness having already stated—

"Senator Jenner. Listen, Mr. Chairman, counsel is here as a privilege, not as a right.

[fol. 72] "Mr. Fraenkel. I appreciate that.

"Senator Jenner. I resent the counsel making voluntary statements. Of course, the witness is permitted to seek advice of counsel which is permissible in this committee.

"Senator Hennings. The Senator has properly stated the functions and limitations of counsel. Counsel, I am sure, appreciates it.

"Mr. Fraenkel. I appreciate that. But this being executive session, I thought that counsel has greater freedom than in public session.

"Senator Hennings. We try to be reasonable with counsel and we try to give them latitude, but you can appreciate that statements and observations by counsel do not serve any useful purpose in this inquiry, burden the record, and are not in accord with the general policy and methods of operating our committee.

"Mr. Sourwine. Sir, as a technical matter, I believe that the witness' statement that he believed the last question to be beyond the competence of the committee, or whatever he did state in the nature of an objection, I am a little afraid that the record does not show that after the raising of that objection, the witness was ordered to answer the [fol. 73] question.

"Senator Hennings. In any event, the witness will again be ordered and directed to answer the question.

"Mr. Shelton. I respectfully decline to answer the question on the grounds that it is beyond the scope of this committee's inquiry.

"Senator Hennings. Very well.

"Mr. Sourwine. I have no more questions, sir."

The Court: At this stage of the proceedings, the Court is going to take a recess for lunch, and we will recess until 2:00 o'clock this afternoon.

(Whereupon, at 12:30 p. m., a luncheon recess was taken until 2:00 p. m.)

[fol. 74]

COLLOQUY BETWEEN COURT AND COUNSEL

Afternoon Session

(2:00 p.m.)

Mr. Rauh: If Your Honor please, we have subpoenaed Mr. Charles Halleck (standing). Mr. Halleck is a hostile witness, but I don't want to put him to any more inconvenience than I can help. He has just become a father again and he is taking his wife home from the hospital tomorrow. He is also a law student. He informs me that the combination of these makes tomorrow a terrible day for him.

Now I am willing to do anything to accommodate Mr. Halleck, and I wondered what Mr. Hitz thought of possibly putting him on now or arranging to do it afterwards, sir. It is simply a matter of Mr. Halleck's convenience. It is of no matter to the defense.

The Court: What is your situation for the rest of the day?

Mr. Rauh: He can be here all day today, he has informed me.

Mr. Hitz: We don't object to him being called out of turn, if it is all right with the Court.

The Court: It is.

How much longer do you think it will take your testimony, Mr. Hitz, the Government's testimony?

Mr. Hitz: I think it will take about forty-five minutes more at the most.

[fol. 75] The Court: Then we can let him have forty-five minutes more of the Government's case, if you want to call him out of turn.

Mr. Rauh: I have some considerable cross examination, but I can start that and stop in time. What time is your stopping time, if Your Honor please?

The Court: I usually run until about 5:00 o'clock.

Mr. Rauh: Oh, we ought to get him on. May he go to the witness room?

The Court: Yes.

(Mr. Halleck leaves the courtroom.)

By Mr. Hitz:

Q. Mr. Sourwine, I think you had completed reading, without any omissions, the executive testimony of Mr. Shelton in December, '55, in New York City; is that right, sir?

A. Annex 1.

Q. That is correct, from the report of the committee.

A. Yes, sir.

Q. Was Mr. Shelton subsequently informed that the committee wanted him to return and give more testimony?

A. Yes, sir.

Q. In what fashion was he advised of that?

A. His counsel was called and told that he should come.

Q. And he did appear on January 6, 1956; is that correct, [fol. 76] sir?

A. Yes, sir.

Q. In Washington, D. C.?

A. Yes, sir.

Q. Was that the next time that he appeared before the committee?

A. Yes, sir, that was it.

Q. And the only other time other than the executive session that we have just read; is that correct, sir?

A. Yes, sir.

Q. Now, was the testimony of Mr. Shelton on the second appearance published in Part 17 of a publication of the subcommittee entitled "Strategy and Tactics of World Communism," subtitle, "Community Activity in New York"?

A. The hearings which included the testimony of Mr. Shelton were published in a volume which bore that subtitle at the top, yes, sir.

Mr. Hitz: Would you mark this No. 7 for identification?

(Government Exhibit 7 was marked for identification.)

Mr. Hitz: Do you have a copy of this?
Mr. Rauh: Yes.

OFFER IN EVIDENCE

Mr. Hitz: Your Honor, I would like to offer in evidence [fol. 77] this Part 17, with particular reference to certain portions of it, but I think the entire volume is admissible in evidence here. We will read only a small portion of it. May it be received?

Mr. Rauh: No objection, Your Honor.

The Court: Government's Exhibit 7 will be admitted in evidence.

(Government Exhibit 7 marked for identification was received in evidence.)

Mr. Hitz: And I have an extra copy, if the Court would like to use it as a working copy instead of the evidence copy.

Would Your Honor pardon me, I just received a note from somebody who is waiting here. May I read the note?

The Court: You may.

Mr. Hitz: Thank you.

The Court: Does counsel need to be excused for a moment?

Mr. Hitz: No, I do not need to, thank you.

The Court: Very well.

By Mr. Hitz:

Q. Mr. Sourwine, Part 17—have you got a copy of it?

A. Yes, sir.

Q. Part 17 concerns itself with the testimony of wit- [fol. 78] nesses on January 4, 5, 6, 1956; is that correct, sir?

A. That is correct.

Q. And it bears the subhead, "Communist Activity in New York"; is that right?

A. Yes, sir.

Q. And the index indicates that Mr. Shelton appeared

on Page 1721, which would make it under the date of the 6th of January, the last of the three days; is that right?

A. Yes, sir.

Q. By the way, Matilda Landsman was called in these same hearings, was she not?

A. Yes, sir.

Q. And her testimony appears on what page—1769, isn't it?

A. Yes, sir, 1769.

Q. That, of course, would be after Mr. Shelton testified?

A. On the same day, yes, sir.

Q. On the same day, however, and also on the 6th of January. Now, of course, Mr. Shelton had already testified in the executive session, because it was in December, '55.

A. Yes, sir.

Q. Had Miss Landsman given testimony in executive session before this public testimony of hers?

A. My memory is that she had.

[fol. 79] Q. With reference to Miss Landsman, while we are on the subject, Mr. Sourwine, I believe you have testified that the committee was possessed of certain information concerning her efforts in the Typographical Union in New York City; is that right?

A. Yes, sir, I gave testimony on that subject.

Q. Did you have information that she was a member of that union?

A. Yes, sir.

Q. Active in its work?

A. Yes, sir.

Q. When she testified in executive session, was she asked about that union activity?

A. My memory is that she was.

Q. Was she asked about her alleged Communist Party activities?

A. Yes, sir.

Q. Did she give information on those two subjects or did she not?

A. My memory is that she took the Fifth Amendment and declined to answer the questions.

Q. Having in mind the amendment of 1954 to the Internal

Security Act of 1950, was that one of the statutes that your subcommittee was charged with investigating the efficacy and the administration of under Parts 1 and 2 of [fol. 80] the Resolution 366?

A. If you are referring to the Communist Control Act, the answer is yes.

Q. I am referring to it. Is that the 1954 amendment to the Internal Security Act?

A. Yes, sir.

Q. Did the 1954 amendment, the Communist Control Act of 1954, make any mention of union activities?

A. Yes, sir.

Q. Did it have any provisions with respect to the rights and privileges of unions which had been found to be communist-dominated?

A. Yes, sir.

Mr. Rauh: Objection, Your Honor. I don't understand the relationship of any statutes to this problem. We all know what the law is. I don't think we need the witness to tell us what statutes were on the book at a given time.

Mr. Hitz: I think technically that Mr. Rauh might be on sound ground, if his objection is the best evidence rule. I am trying to proceed—if it is so easy for us to find out what the law states, then there is no problem cross examining the witness if he states it improperly. I just wanted to get on in that fashion. We can, of course, introduce and read into the record the statute, if Mr. Rauh persists in the best evidence rule objection.

[fol. 81] The Court: The objection would have to be sustained on the best evidence rule.

Mr. Hitz: I will, however, cite it to the Court and to the record. The Communist Control Act of 1954 was passed in August, 1954, and is 68 Stat. 775, and is found in 50 United States Code, and commences at Section 841.

The Court: Of which the Court can take judicial notice and does take judicial notice.

Mr. Hitz: Yes, Your Honor.

I think, however, we could bring out from the witness properly that the act did concern itself in some fashion

or other with certain union activities and communist activities.

The Court: Very well.

By Mr. Hitz:

Q. And with that, Mr. Sourwine, did you on behalf of the committee question Miss Landsman when she was in executive session?

A. Yes, sir.

Q. Mr. Sourwine, would you be good enough to turn to Page 1587 of Government No. 7?

The Court: What is the page, counsel?

Mr. Hitz: I am sorry, sir, 1587, which is the first page, actually, of this Part 17.

By Mr. Hitz:

[fol. 82] Q. Could you tell us whether what is recorded here and printed is substantially accurate to your recollection of what happened?

A. It is.

Q. Would you be good enough to state whether this hearing took place in Washington on January 4, '56?

A. It did.

Q. And were Senators Eastland, Johnston, Hennings, McClellan, Jenner, Watkins and Welker present?

A. Yes, sir.

Q. Were you the interrogator?

A. I asked most of the questions, sir.

Q. Would you be good enough to read what the chairman had to say on that page and the next page? By the way, this was the commencement of these hearings, is that correct, on communist activity in New York as a subhead to "Strategy and Tactics of World Communism?"

A. No, sir, I don't think that is a fair statement. This was the commencement of three days of hearing in New York. This title was put on by an editor afterwards, when it came to the point of printing the regular book of the hearings.

Q. But this was in the nature of an opening statement in reference to the three-day hearings that are contained in this volume?

A. Yes, sir.

[fol. 83] Q. Would you read it for us?

A. (Quoting):

"The Chairman. Come to order.

"The hearings we are about to open stem from sessions of this subcommittee held on June 28 and 29, 1955, in which we heard the testimony of Mr. Winston Mansfield Burdett, a newspaperman and broadcaster.

"Having been drawn into the Communist Party in 1937 and having left that organization in the early 1940's, Mr. Burdett rendered a patriotic service by disclosing to the subcommittee the names of men and women whom he knew as members of the Communist Party.

"In conformance with its mandate from the United States Senate and from the American people, the subcommittee was in duty bound to pursue every lead which developed out of the Burdett testimony. In justice to those named it could not do otherwise than give these individuals an opportunity to affirm or deny allegations made. Some have explained fully and frankly the nature of their associations. Others have invoked the protection of the fifth amendment in refusing to answer questions in regard to their Com-

[fol. 84] munist affiliations.

"The subcommittee could not be unmindful of the fact that among the persons involved in this investigation have been many who were or are members of the press, and that the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration. These facts did not in any way decrease the importance of carrying forward the investigation with diligence, care and devotion to duty. The present hearings open up a subsequent chapter to the Burdett testimony of June 28 and 29, 1955.

"Who is your first witness?

"Mr. Sourwine. James Glaser.
"The Chairman. Mr. Glaser."

Where do you want me to begin reading on the next page?
Q. Continue through to the end of the next page.
A. (Quoting):

"Senator Hennings. Mr. Chairman.
"The Chairman. Yes, sir. The Senator from Missouri.
[fol. 85] "Senator Hennings. I am very sorry that I was detained for a few minutes and did not hear all of the chairman's statement with respect to the hearings about to get underway. I take it that the chairman was advised, as other members of the committee have been, that, at the request of the committee, I went to New York and presided for two days over the executive hearings.
"The Chairman. Yes.
"Senator Hennings. On the same subject matter. I do believe it is very important at the outset for us to make it abundantly clear, if that is the purpose of counsel, and if it is the purpose of this committee, that this is not in any sense an attack upon the free press of the United States.
"The Chairman. Why, certainly, that is true.
"Senator Hennings. And I think, too, that it should be clear that the best evidence of any subversion or infiltration into any news-dispensing agency or opinion-forming journal is certainly the product itself.
"The Chairman. That is correct.
[fol. 86] "Senator Hennings. Of course, the committee is interested in the extent and nature of so-called Communist infiltration, if such exists, into any news-dispensing agency.
"The Chairman. Correct.
"Senator Hennings. But I would like to have the position of the committee, if it be the position of the majority of this committee, since the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings—that it be generally known and understood that this is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such par-

ticipation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press.

"And I do think that at some later time, perhaps, it might be appropriate for executives of some of the newspapers under inquiry, whose employees are under inquiry, to be called and to testify and for them to show, if they [fol. 87] can show, that the end product, the newspaper itself, has not been influenced by these efforts.

"The Chairman. The Chair thinks that is a very fine and very accurate statement, one with which the Chair certainly agrees, in its entirety.

"We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it, and I think that when this series of hearings is over that no one can say that any newspaper or any employees of any one newspaper has been singled out.

"Senator Hennings. Thank you, Mr. Chairman.

"Senator Watkins. I would like to say I agree with Senator Hennings' statement, Mr. Chairman."

Q. Thank you.

A. That doesn't quite complete the page.

Q. That is all I want.

Now, would you be good enough to turn to the opening session of January 6, which will be found, I think, on Page 1717.

[fol. 88] A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now, Mr. Shelton's testimony appears on Page 1721; is that correct, Mr. Sourwine?

A. It begins on 1721.

Q. And he was the first witness on that day, a Friday?

A. Yes, sir.

Q. Prior to his testimony, the chairman made some remarks and others had something to say for the record; is that true?

A. Yes, sir.

Q. Would you be good enough to tell us where this session took place?

A. In the Caucus Room of the Senate Office Building in Washington, D. C.

Q. And the date is January 6, 1956, is it?

A. Yes, sir.

Q. And what Senators were present?

A. Senators Eastland, Hennings, Watkins, Jenner and Welker.

Q. And how many is that?

A. Five.

Q. How many were on the subcommittee?

[fol. 89] A. Nine.

Q. Will you read, please, what the chairman had to say there, beginning, "The committee will come to order"?

A. (Quoting):

"The Chairman. The committee will come to order.

"I have a telegram that I am going to read into the record. This telegram is addressed to the chairman."

Do you want me to read that?

Q. Let me glance at it first.

Yes, I think you had better read it.

A. (Quoting):

"The Long Island Daily Press is in accord with your committee in its efforts to expose Communist infiltration wherever found, and certainly welcomes any revelations bearing on the local scene.

"Far from being upset because of the revelation that a Communist-directed clique operated in the 1930's among employees of the Press, we are grateful for the authoritative corroboration of the stand we took at the time, both in the columns of our paper and in appearances before public bodies.

"We took our fight to the people during the period of the 'popular front' when the Communists and the fellow travelers were riding high, and we did not shrink from

firing all those who were lending themselves to the [fol. 90] Communist cause.

"Unfortunately there have been distortions of the news emanating from your committee, at our expense. These distortions have in no way been the fault of your committee, but have falsely represented that you are investigating the Press. As the record shows, the Press fought the Communist danger to a standstill in our newspaper and in our community at a time when it was hardly fashionable to do so. If any Communist or fellow traveler in our midst was overlooked, we certainly would be greatful to have him uncovered.

"We do not believe that your committee is 'after' our newspaper. May we ask you, therefore, to cooperate in counteracting a distortion by stating your own knowledge as to the role the Press has played in dealing with Communist infiltration.

(Signed) Edward Gottlieb,
Managing Editor, Long Island Press, Jamaica, N. Y.'

"To which I would make this statement. This will be my reply. I also sent a telegram incorporating what I state here.

"The committee is investigating all of the testimony and information given it by all witnesses, and that includes testimony of Clayton Knowles, to the effect that he was a member of a Communist unit while employed by the Long Island Press during 1937 and 1939."

Q. Let me interrupt. Is he any relation to Mary Knowles? [fol. 91] A. To the best of my knowledge, he is not.

Q. All right, will you read, without omission?

A. (Quoting):

"The committee is not investigating the Long Island Press or any other newspaper. We are aware of the fact that the Long Island Press was alert to the danger of the Communist infiltration from a very early date and was aggressive and effective in combating this danger in its own organization.

"What we are interested in, if we can learn it, is the story of the past and present activities of the persons named by Mr. Knowles as members of the Communist cell to which he belonged. None of these persons, so far as we can ascertain, has been employed by the Long Island Press for many years.

"Senator Hennings. In connection, Mr. Chairman, with the statement the chairman has just read, I was unable to be at the hearing yesterday afternoon because of the meeting of the Democratic policy committee, a great part of the afternoon.

"On Monday I expressed some misgivings and doubts [fol. 92] about the calling of certain witnesses who had been, for a short time or, indeed, even for some considerable time, members of the Communist Party, reaching back into a period of 15 or 20 years ago. I am sure that we have all had some concern about, for example, the calling of Mr. Knowles the other day. I did not know that Mr. Knowles was going to be a witness until shortly before he appeared to testify and knew nothing of the nature of his testimony. He didn't appear before any executive session where I happened to be present. When did he appear, Mr. Sourwine?

"The Chairman. He appeared last fall at an executive session.

"Mr. Sourwine. On October 6.

"The Chairman. At an executive session at which I presided.

"Senator Hennings. I came on the committee last January, so that was before I was a member of the subcommittee, was it not?

"You mean this past October? Yes. That was during some other hearings—hearings of our Constitutional Rights Committee.

[fol. 93] "The thing that I think perhaps this committee might want to give some attention to—and counsel may be able to enlighten us, since we have no list of prospective witnesses, nor has any offer of proof as to what their testimony is likely to be been given to this subcommittee—is whether in calling some witnesses—and I do not know

whether or not there are any witnesses who may be in what seemed to be Mr. Knowles' category or not—we can be sure that we do not do an injustice and cause undue embarrassment and humiliation to a man who has completely rehabilitated himself, if he has no new or additional information to give this committee.

"I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication. But I do believe that in certain cases, if such are to be heard, and if there are witnesses to be heard today or at any other time, in the interests of justice, because we have a duty to protect witnesses as [fol. 94] well as to protect the purposes of this inquiry, that the subcommittee go into executive session so that we may determine whether or not the testimony of certain witnesses will be of substantial value to this committee and to the enlightenment of the general public.

"Mr. Knowles did not appear in New York, and I learned for the first time when he appeared on Monday that he was to be a witness.

"Now, I realize that we have a problem of not calling some witnesses and perhaps calling others in the same category, but I would like to say—and I am sure that the other members of this subcommittee are equally mindful to the same degree—that simply to call a witness for the purpose of getting cumulative testimony, and particularly where his activities have been remote in time, and even more especially where they have been of very short duration and where he has rehabilitated himself, as Mr. Knowles did, by going to the FBI, by going to his employer and making a full and complete disclosure—I just wonder what useful purpose can be served in some instances in calling such witnesses.

"What I am saying, I say by way of first suggesting [fol. 95] that in such cases I do hope that counsel will consult with the committee in executive session if counsel has any doubt as to these points, because the law does recognize, even in the case of one having been convicted

of a felony, that if that is remote in time—and the courts vary as to the number of years which may be said to be remote in point of time—but that the defendant or other witness may not be interrogated as to previous convictions if they are so remote and if the witness has thereafter led a blameless and upright life. And I do think in the interest of justice and in the interests of preserving the integrity and the high standing of this committee, we should be particularly cautious and aware of the possibility of unnecessarily calling one before us who may have nothing to add to the general subject matter of our inquiry and who may be seriously damaged in his own personal and professional life.

"I feel that that statement should be made at this time, and in making it, I do not reflect upon the judgment of anybody, either the witnesses we are to hear hereafter or [fol. 96] those that we have heard before.

"Today, for example, we have no list of witnesses who are to appear. I assume that most of them are witnesses, Mr. Sourwine, who appeared in the executive hearing.

"Mr. Sourwine. Yes, sir.

"Senator Hennings. All of them? All of them, are they?

"Mr. Sourwine. That is right.

"Senator Hennings. But I would like to suggest to the chairman that occasionally we do have an executive session of the committee so that counsel may make an offer of proof, as we do in court, to determine some of these close cases.

"The Chairman. Now, let the chairman state right there that the chairman was not at the executive sessions in New York City. The Senator from Missouri conducted those sessions. And after the conclusion, I tried to reach him for a number of days and was informed by his office that he could not be reached.

"So I discussed the testimony and set these hearings, and I think I took the right position and the only position that I could take.

"Now, Mr. Knowles, I think, made a very fine witness. [fol. 97] He has given the committee information that I

think is invaluable. Some of it leads to people who are now in a State government.

"Senator Hennings. By the same token, of course, I was in the State of Missouri after the hearings, and I do not reflect upon the chairman in any sense when I make that statement. But I also tried to reach the chairman the week preceding Christmas week, and it just so happened that we are at times, all of us, difficult to reach.

"The Chairman. I am not blaming the Senator from Missouri. I was in my home in bed the week before Christmas.

"Senator Hennings. Yes. I understood that the Senator had not been well.

"Now, I have three other conflicting committee meetings this morning. I shall be here, I would like to announce, Mr. Chairman, as much and as often as I can be here today. The Antitrust Subcommittee is meeting in executive session at this time, the Juvenile Delinquency Subcommittee, and this committee.

"I just have a note that the Antimonopoly Committee is [fol. 98] calling, and they want to approve the budget of that committee. So if I may be excused a few moments, I will return when I can.

"The Chairman. Yes, sir.

"Senator Hennings. All I wanted to say, in summing up, Mr. Chairman, is that, I believe, we should continue to proceed with all caution and all consideration.

"The Chairman. I certainly agree with that. I don't think that the Senator from Missouri will say that it has ever been the chairman's position to try to humiliate or hurt anyone. We are attempting to conduct these hearings and elicit all the facts, and I certainly think that I would have been derelict in my duty had Mr. Knowles not been called, and I am confident that future hearings will vindicate the information he has given us, the leads he has given us.

"Call your witness."

Q. Let me interrupt you there, please, sir.

I wonder if you would now glance at Page 12, which is

Annex 2 of the report of the committee citing Mr. Shelton, being Report No. 1934, and Government No. 6.

[fol. 99] Will you tell us whether the printed report of Mr. Shelton's testimony as contained in the report on Page 12 is that which is now to commence on Page 1720 of Part 17, being Government 7?

A. Yes, sir, except that I don't think it is technically testimony until he is sworn in, and he isn't sworn in yet. It is his statement before the committee, the same statement made by Mr. Shelton, the same questions asked him and the same answers appear on Page 12 of the report and on Page 1720 of Document 7.

Q. In other words, in the report at Page 12, the asterisks that occur there indicate the omission of these preliminaries that you have just read from the full report of the hearing; is that correct, sir?

A. Yes, sir.

Q. Now, would you be good enough to tell us whether or not you know why Mr. Shelton was asked to return to give further testimony on January 6, after having given some testimony in executive session on December 7, '55?

A. Yes, sir.

Q. Tell us, please.

Mr. Rauh: Is this something that the witness knows of his own knowledge or is it something told to him by the chairman of the committee?

By Mr. Hitz:

[fol. 100] Q. Do you know the answer to that question, of your own knowledge, sir?

A. Yes, sir.

The Court: You may proceed.

Mr. Hitz: Is that the only objection, Mr. Rauh?

Mr. Rauh: Yes, that is all.

By Mr. Hitz:

Q. Will you tell us?

A. I might explain for the satisfaction of counsel, I know

it of my own knowledge because Mr. Shelton was called on my recommendation, and I know why I recommended it.

Mr. Shelton, in his appearance in executive session, had declined to answer a number of questions, had withheld from the committee the answers to these questions. They were questions in the area in which the committee wanted information. I was satisfied that he had such information, and I hoped that if he came on in executive session, that perhaps he might change his mind and give it to us.

Q. Had your committee, to your knowledge, had that same experience with any other witness in the past, that is, that they refused to give information initially and on a subsequent appearance did give information sought?

A. Yes. The witnesses frequently change their position. We have had a witness appear several different times and take a different position each time.

[fol. 101] Q. For example, did that occur before your committee with respect to or by Dr. Bella Dodd?

A. Dr. Bella Dodd's initial refusal was not before our subcommittee, but Dr. Bella Dodd initially refused under oath to give information respecting her communist affiliations and her knowledge of communist activity and was quite resentful of the committee's attempt to even get information. Dr. Dodd subsequently has appeared before our committee and elsewhere and has given such information quite fully. We never feel, Mr. Hitz, that the fact that a witness has at one time refused to answer a question is an absolute sign that the witness will refuse to answer on some subsequent occasion. It is the witness' privilege to change his mind if he wants to.

Q. Now, at the time that Mr. Shelton was being questioned on January 6th, had Miss Landsman already appeared in executive session before the subcommittee?

A. It is my memory she had, yes, sir.

Q. Can you tell us whether, in fact, she did?

A. Mr. Hitz, when I say it is my memory that she had, I mean to the best of my personal recollection, she did.

Q. Can we get at it this way: Doesn't Miss Landsman's testimony occur on the same day in public session as Mr. Shelton's?

A. Yes, sir.

Q. Can you recall whether or not Miss Landsman, as [fol. 102] a matter of fact, did appear or did not in executive session prior to the day that she testified in public?

A. Yes, sir, she did.

Q. So the answer to my question is what?

A. Yes, sir, she did.

Q. Now, with respect to the legislative function of your subcommittee and of the parent committee, the Judiciary Committee, when there were amendments being considered in the year 1954 to the Internal Security Act of 1950, which amendments resulted in the passage in August of 1954 of the Communist Control Act of that year, did the Judiciary Committee, the parent committee of your subcommittee, have any proposal with respect to a statute that had to do with infiltration of unions? Do you understand my question?

A. I think so.

Q. Would you like me to reframe the question?

A. It would be helpful, sir.

Q. In the year in which that amendment to the Internal Security Act of 1950, bearing the name the Communist Control Act of '54, ultimately was passed, did the Judiciary Committee, to your knowledge, have any proposal to offer, which it did offer, having to do with infiltration of unions? Now is that question clear, sir?

A. Yes, sir.

Mr. Rauh: Objection on the ground of relevance. The question is at a time so many months before when the de- [fol. 103] fendant testified. I do not see any possible relevance of what they did before that. We admit the statute was passed; in fact, Your Honor has taken judicial notice that the statute was passed. I do not see any relevance to this defendant of something that occurred six months before.

Mr. Hitz: Your Honor, the Government, of course, is aware that the law is that it is unnecessary for the Government to be able to show and to show that a particular committee, in order to be held to have had a legislative purpose, actually ever made any legislative recommendations. They may never have done so. They may never have felt that the law was such that it required an amend-

ment or that the field required Congress to enter that field. However, if the Government can show that, nevertheless, action had been taken of one sort or another by that committee, it does, in fact, show an actual legislative purpose, and therefore we feel that we can show that.

Now the connection along that line that would be argued by me is that if in 1954, when certain labor union amendments were added to the 1950 act, this committee or its parent committee was engaged in putting forward proposals in that same direction, it would indicate that the matter of infiltration of unions had actually been considered and was before that committee; in other words, that it did, in fact, exercise a legislative function with respect to that [fol. 104] field of activity. We can show that, and if we can show it, we feel, although we need not go to this extent, we would be proving legislative purpose in fact.

The Court: The resolution itself would be sufficient to cover any inquiry along the line you are making here, even within the legislative jurisdiction of the committee, but if the witness can testify that something in addition happened after the 1950 act, or the amendment to the act, I think it is competent. I will permit the witness to answer. The objection will be overruled.

The Witness: The bill which ultimately became the Communist Control Act of 1954 was sponsored by two of the members of the Internal Security Subcommittee, Senator McCarran and Senator Butler, and was originally reported out of the Internal Security Subcommittee to the full Committee on the Judiciary of the Senate.

By Mr. Hitz:

Q. Would you be good enough to continue to read, without omission, from the hearing at which Mr. Shelton appeared. that is, where you just left off?

A. (Quoting):

"The Chairman. Call your witness.

"Mr. Sourwine. Mr. Shelton.

"The Chairman. Will you hold your hand up.

"Mr. Shelton. Before I am sworn in, Mr. Chairman, I

[fol. 105] would like to raise an objection that might have some bearing as to whether or not I am sworn in.

"I wish to challenge the jurisdiction of the committee to call me here in Washington, based on the fact that my testimony in executive session makes it clear that the committee will obtain no information from me—

"Senator Jenner. I cannot hear you. Will you speak a little closer to the mike.

"Mr. Shelton. If I may repeat this:

"I challenge the jurisdiction of the committee to call me here in Washington, based on the fact that my testimony in executive session makes it clear that the committee will obtain no information from me that could possibly assist it in any legislative purpose.

"To question me further in Washington might subject me to prosecution in violation of my right to be tried in the community where I work and live.

"Furthermore, I fail to see why I am involved in this hearing, which the chairman said on Wednesday stems from the Burdett testimony. There was no reference to me [fol. 106] in the Burdett testimony nor in the testimony of Clayton Knowles.

"Mr. Sourwine. Mr. Chairman, what the witness has said boils down to an assertion that because he has refused to answer certain questions before the committee in executive session, the committee has lost jurisdiction to ask him the same or other questions in public session.

"I think that is absurd, and I respectfully ask that the objection be overruled, and that the witness be sworn.

"The Chairman. Yes, the objection is overruled.

"Will you hold your hand up.

"Do you solemnly swear the testimony you are about to give the Senate Internal Security Subcommittee is the truth, the whole truth, and nothing but the truth, so help you God?

"Mr. Shelton. I do, sir.

"Testimony of Robert Shelton, New York, N. Y.

"Mr. Sourwine. Would you give the reporter your full name, please?

"Mr. Shelton. Robert Shelton.

"Mr. Sourwine. You have a middle initial, Mr. Shel-
[fol. 107] ton?

"Mr. Shelton. No, I don't.

"Mr. Sourwine. And your address, sir?

"Mr. Shelton. 191 Waverly Place, New York 14, N. Y.

"Mr. Sourwine. You are here represented by counsel?

"Mr. Shelton. Yes.

"Mr. Sourwine. Would you introduce your counsel, please.

"Mr. Shelton. Osmond K. Fraenkel, F-r-a-e-n-k-e-l.

"Mr. Sourwine. And the New York City address?

"Mr. Shelton. 120 Broadway.

"Mr. Sourwine. Mr. Shelton, what is your business or profession.

"Mr. Shelton. I am a copy editor.

"Mr. Sourwine. Where are you employ[illegible]?

"Mr. Shelton. The New York Times.

"Mr. Sourwine. How long have you been employed there?

"Mr. Shelton. It will be five years in February.

"Mr. Sourwine. Have you been employed as a copy editor
[fol. 108] all of that time?

"Mr. Shelton. No. For about the past year and a half, I have been copy editor.

"Mr. Sourwine. What did you do before that?

"Mr. Shelton. I was a news clerk.

"Mr. Sourwine. What does that mean? What is a news clerk, sir?

"Mr. Shelton. Well, a news clerk is one—an assistant or an apprentice. I worked on the city desk.

"Mr. Sourwine. Did you ever write obituaries?

"Mr. Shelton. If this is not an investigation into the press, Mr. Sourwine, I don't see the pertinency of the question to the scope of the investigation.

"Mr. Sourwine. We are attempting to determine what your employment is, sir. Did you ever write obituaries?

"Mr. Shelton. I am a copy editor, sir, in the news department of the New York Times.

"Mr. Sourwine. Did you ever write obituaries?

"Mr. Shelton. Write obituaries?

[fol. 109] "Mr. Sourwine. Yes, sir.

"Mr. Shelton. That is not my job, sir.

"Mr. Sourwine. Did you ever write obituaries?

"Mr. Shelton. I may at one time have rewritten an obituary, but my job is that of a copy editor.

"Mr. Sourwine. Did you write the obituary for Richard H. Krebs, Jan Valtin?

"Mr. Shelton. I do not write obituaries. The answer to that is 'No,' sir.

"Mr. Sourwine. Right.

"Mr. Shelton. I am raising the question since this is not a question of the investigation of the press, why you are asking why I have written—

"Mr. Sourwine. Are you, sir, a member of the Communist Party U. S. A.?"

Mr. Hitz: Excuse me, Your Honor, that is Count No. 1.

The Witness: (Quoting):

"Mr. Shelton. In reply to that, sir, I would like to make a brief statement that answers—that deals with the question.

"No one who knows me would doubt my loyalty to the [fol. 110] Government of the United States; because I am a loyal American, I must, as a matter of principle, challenge questions into my political beliefs and associations as a violation of my rights under the first amendment to the Constitution.

"Mr. Sourwine. Do you, sir, consider membership in the Communist Party a matter of political belief?

"Mr. Shelton. If I may be allowed, sir, to continue the statement. I haven't raised my objections.

"Mr. Sourwine. Would you answer that question and then you may.

"Senator Jenner. Let the record show consultation.

"(Consultation between witness and his counsel.)

"Mr. Shelton. I object to the question on the very same grounds.

"Mr. Sourwine. You mean you are declining to answer that question?

"Mr. Shelton. That is correct. I decline to answer on the grounds of the first amendment and challenge to the jurisdiction of the committee.

[fol. 111] "The Chairman. Now, I overrule that objection.

"Mr. Shelton. And I would like to continue with my statement because I have not gone into my reasons for it.

"Senator Jenner. Mr. Chairman, I move that you order and direct the witness to answer that question.

"The Chairman. Yes, the first amendment does not give you legal right to refuse to answer questions. Now, I order and direct you to answer the question.

"Mr. Shelton. I am answering the question, sir, in the statement, if I may continue to read it. I am not on trial here, sir. But I think that because of the nature of this hearing, my integrity and possibly my career are at stake. If I may be allowed to continue to state my—

"The Chairman. All right, I am going to permit you to do it.

"Mr. Shelton. Thank you, sir.

"That amendment says:

> "Congress shall make no law • • • abridging the freedom of speech, or of the press; or the right of the [fol. 112] people peaceably to assemble • • • .'

"Several weeks ago Professor Alexander Meiklejohn testified before the Senate Subcommittee on Constitutional Liberties. He said, in part:

> "'Suppression is always foolish. Freedom is always wise. That is the • • • experimental faith by which we Americans have undertaken to live.'

"He also said:

> "'• • • • no subordinate agency of the Government has authority to ask, under the compulsion to answer, what a citizen's political commitments are. The question, 'Are you a Republican?' or 'Are you a Communist?', when accompanied by the threat of harmful or degrading consequences, if an answer is refused, or if the

answer is this rather than that, is an intolerable invasion of the 'reserved powers' of the governing people.'

"I hold with Professor Meiklejohn on both points. As a matter of principle, I decline to answer the question because it invades my rights under the first amendment. I would decline similarly if asked whether I was or had ever been a Democrat, Republican, Socialist, Jew, Catholic, or Protestant, vegetarian, prohibitionist, or sun worshipper.

"The question also threatens freedom of the press as [fol. 113] guaranteed by the first amendment. I believe no other governmental body in the free world would call a newspaperman and demand to know his political beliefs and associations. However unknowingly or unwittingly, gentlemen, in the quest for internal security, you are threatening long-standing and hard-won American liberties. The Supreme Court has held that—

"'* * * the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate * * *.'

"A body is the sum of its organs, a machine the sum of its parts. An attack on the smallest component of a body or machine is an attack on the whole. An invasion of my individual rights is an invasion of the rights of the paper that employs me and an invasion of the rights of the newspaper profession as a whole. This subcommittee is nudging the end of my copy pencil, it is peeking over my shoulder as I work. This subcommittee is engendering the fear that soon it will be looking into newsrooms all over the coun- [fol. 114] try.

"If, as a result of my being called here, I am put under mental pressure to change one word or one sentence in material that I edit, an abridgment of freedom of the press will have taken place. Demanding to know what is going on in the mind of a newspaperman without inhibiting a free press is impossible. Your question acts as a form of 'prior restraint' on publishing, telling newspaper executives who should or who should not be on their staffs.

"A journalist's credo I wholeheartedly support is 'to give the news impartially, without fear or favor, regardless of any party, sect, or interest involved. * * * But by being called before you to answer about my political beliefs and associations, I am placed in fear of having my loyalty considered suspect if I do not, while freely exercising my sound conscience, answer this committee's questions. I am obliged to seek your favor to guard my personal integrity, and that of the paper for which I work.

"I am involved in these hearings as a victim of accident. [fol. 115] The subpoena first served to me was originally made out in the name of a person who does not work on my paper. A committee aide, when told that there was no such person on the Times, insisted on knowing if there was anyone with a similar name employed there. There were a few, but the only one that interested your man was the sole similar name in the news department—mine. At the executive hearings the committee counsel tried without success to link me with a certain New York newspaper. He was unable to establish any connection because I never worked for the paper under discussion. Yet I have been called back here today. It appears to be just another step in a campaign to discredit the paper for which I work.

"I am not saying that I, as a newspaperman, am immune from investigation. If I have committed a crime or am alleged to have committed a crime, let a grand jury indict me and let me stand trial for the charge. I fear no such indictment because I have committed no crime. As Chief Justice Warren has ruled:

> [fol. 116] "'* * * * the power to investigate must not be confused with any of the powers of law enforcement. * * * Still further limitations on the power to investigate are found in the specific individual guaranties of the Bill of Rights. * * *'

"Let me, in complete sincerity, cooperate with you by saying this: One of the greatest contributions that can be made toward the internal security of the United States would be to promote—

"The Chairman. Wait just a minute. We are not interested in your idea of what would promote the internal se-

curity of the United States. The way to prevent your loyalty from being questioned is to freely and fully answer the questions that are asked you, sir. I overrule the objection and order you to answer the question.

"Mr. Shelton. I respectfully decline to—there is in the final paragraph of this sentence an additional objection.

"The Chairman. You have listed the first amendment.

"Mr. Shelton. There is still—

"The Chairman. That is overruled.

"Mr. Shelton. There is an additional objection here, [fol. 117] sir, if I may—I have two more paragraphs and I will be through with my statement.

"The Chairman. I wanted you to answer the questions. I overrule the objection.

"Mr. Shelton. Furthermore, I challenge the jurisdiction of this subcommittee.

"The Chairman. Wait just a minute. Answer the question.

"Mr. Shelton. I refuse to answer on the grounds of the first amendment and a challenge to the jurisdiction of the committee.

"The Chairman. Those are the only grounds you have?

"Mr. Shelton. And the grounds set forth here in my statement, sir.

"The Chairman. Set forth in your statement? Now your last two paragraphs that you mentioned are a challenge to the jurisdiction of the committee, is that right?

"Mr. Shelton. Well, I believe that the challenge to the jurisdiction is implicit throughout my statement. It quotes from the Supreme Court ruling, and the whole substance of it.

"The Chairman. You have two paragraphs you desire [fol. 118] to read?

"Mr. Shelton. Beg pardon?

"The Chairman. You say you have two paragraphs more you desire to read?

"Mr. Shelton. Yes, sir.

"The Chairman. Read them.

"Mr. Shelton. Let me, in complete sincerity, cooperate with you by saying this: One of the greatest contributions that can be made toward the internal security of the

United States would be to promote the maintenance of a press that is free and unfettered and unafraid; a press and newspapermen that will criticize what they please and support what they please. It is a rightful role of the press to be a watchdog over government. It is not a rightful role of government to be a watchdog over the press. Let the reader at his breakfast table be the judge of whether a paper suits him or not, and by extension, whether the men who produce that paper suit him.

"On the basis of these considerations, I must respectfully arrive at the conclusion that this question is a viola- [fol. 119] tion of my rights guaranteed by the first amendment in respect to freedom of speech and of the press and peaceable assembly. Furthermore, I challenge the jurisdiction of this subcommittee to ask the question.

"The Chairman. Yes, sir. I overrule the objection. The question sought information as to whether you are a member of the conspiracy to destroy the Government of the United States. It is a proper subject for inquiry, and I order you to answer the question.

"Mr. Shelton. I respectfully will decline to answer the question, sir, on the grounds set forth in my statement.

"The Chairman. On penalty of contempt of the United States Senate, I order you and direct you to answer the question.

"Repeat the question.

"Mr. Sourwine. Are you, sir, a member of the Communist Party, U. S. A.?

"Mr. Shelton. I respectfully decline to answer the question on the basis of the grounds set forth in my statement.

"Mr. Sourwine. Do you by those grounds, sir, intend to make any claim of privilege under the fifth amendment [fol. 120] to the Constitution?

"Mr. Shelton. I do not, sir.

"Mr. Sourwine. Have you ever been a member of the Communist Party in the past?

"Mr. Shelton. I respectfully decline to answer the question, sir, on the basis of the grounds set forth in my statement.

"Mr. Sourwine. So that those grounds may be clear, I will ask again the question which I asked, the answer to

which the chairman permitted you to decline. This question: Do you believe that membership in the Communist Party is merely a matter of political belief?

"(Consultation between witness and his counsel.)

"The Chairman. Let the record show that he conferred with his counsel.

"Mr. Shelton. I respectfully decline to answer that question, sir, on the basis of the grounds set forth in my statement.

"Mr. Sourwine. You have in your statement, sir, likened the Communist Party to the Democratic and Republican Parties. Do you think the Communist Party and the Demo-
[fol. 121] cratic Party and Republican Party are all in the same category?

"Mr. Shelton. I respectfully decline to answer that question, sir, on the grounds set forth in my statement.

"Mr. Sourwine. In your statement, sir, you likened the Communist Party to Catholics and Jews. Do you think Catholics, Jews and Communists are all in the same category?

"Mr. Shelton. (No response.)

"The Chairman. Answer the question.

"Mr. Shelton. I believe that I have made this clear in my statement. I wish to stand on my statement.

"Senator Jenner. Order and direct him to answer the question.

"The Chairman. I order and direct you to answer the question, sir.

"Mr. Shelton. I respectfully decline to answer the question on the basis of the grounds set forth in my statement.

"Mr. Sourwine. In your statement, sir, you likened the Communist Party to sun worshippers. Do you think sun worshippers and Communists are in the same category?
[fol. 122] "Mr. Shelton. I respectfully decline to answer the question on the grounds set forth in my statement.

"Mr. Sourwine. Mr. Shelton, did you write that statement yourself without assistance?

"Mr. Shelton. Yes, sir, I did. I conferred with my counsel on it, but I wrote every word in the statement with the exception of the quotes from Professor Meiklejohn,

the quotes from the late Adolph S. Ochs, the quotes from the Supreme Court and a paraphrase of the late editor of the New York Times, Charles Ransom Miller.

"Mr. Sourwine. Do you, Mr. Shelton, know any persons who are known to you to be members of the Communist Party?

"Mr. Shelton. I respectfully decline to answer the question, sir, on the basis of the grounds set forth in my statement.

"Mr. Sourwine. Did you, Mr. Shelton, ever attend Communist meetings?

"Mr. Shelton. I respectfully decline to answer that question, sir, on the basis of the grounds set forth in my statement.

"Mr. Sourwine. Mr. Shelton, do you know Matilda [fol. 123] Landsman?

"Mr. Shelton. I respectfully decline to answer the question, sir, on the basis of the grounds set forth in my statement.

"Mr. Sourwine. Do you, Mr. Shelton, have any knowledge respecting a Communist attempt to take over control of Typographical Union No. 6?

"Mr. Shelton. If I may confer with my counsel—

"Mr. Sourwine. Yes.

"(The witness consults with his counsel.)

"Mr. Shelton. No, sir.

"Mr. Sourwine. Did you ever discuss with Matilda Landsman the question of any Communist activity in that union?

"(The witness consults with his counsel.)

"Mr. Shelton. No, sir.

"Mr. Sourwine. Now, for the purpose of testing the credibility of that answer, sir, I will ask you, did you ever have any conversation with Matilda Landsman?"

Mr. Hitz: That is Count No. 2, Your Honor.

[fol. 124] The Witness: (Quoting):

"Mr. Shelton. I respectfully decline to answer the question, sir, based on the grounds set forth in my statement.

"The Chairman. You are ordered and directed under penalty of contempt of the United States Senate to answer that question.

"Mr. Shelton. I am really amazed, sir, that you mention the word 'contempt'. If you should attach any criminality—

"The Chairman. Answer the question, sir.

"Mr. Shelton (continuing). To a difference of opinion—

"The Chairman. Answer the question. You are going to be cited for contempt unless you do.

"Mr. Shelton. I respectfully decline to answer the question, sir, on the basis of the grounds set forth in my statement.

"Mr. Sourwine. Mr. Shelton, did you ever secure employment through Communist channels or with the assistance of persons known to you to be Communists?

"(The witness consults with his counsel.)

[fol. 125] "Mr. Shelton. The answer to that, sir, is 'No'.

"Mr. Sourwine. Did you, Mr. Shelton, ever assist any person known to you to be a Communist to secure employment?

"Mr. Shelton. The answer to that is 'No,' sir.

"Mr. Sourwine. Did you, Mr. Shelton, ever discuss with your employers the question of any Communist activity in which you engaged in the past?

"Mr. Shelton. I really must challenge the pertinency of that question to the scope of the investigations.

"The Chairman. I order and direct you to answer the question.

"Mr. Shelton. So there will be no doubt, sir, the answer to that question is 'Yes'.

"Mr. Sourwine. What did you tell them?"

Mr. Hitz: Excuse me. That is Count No. 3.

The Witness: (Quoting):

"Mr. Shelton. I respectfully decline to answer that question, sir, on the basis of the grounds set forth in the statement.

"The Chairman. Now, you are ordered and directed to [fol. 126] to answer the question.

"Mr. Shelton. I respectfully decline to answer the question, sir, on the basis of the grounds set forth in my statement.

"Mr. Sourwine. Was what you told your employer in that conversation about your past Communist activity, if any, the truth, the whole truth and nothing but the truth?

"Mr. Shelton. That, sir, sounds to me like a question of, when did I stop beating my wife. I am single, sir.

"The Chairman. Answer the question.

"Mr. Shelton. Whatever I have told my employers is the truth, sir.

"Mr. Sourwine. Why are you afraid to tell it here? You are under oath now. You were not then.

"Mr. Shelton. It is not a question of here, sir.

"Mr. Sourwine. Why won't you tell us here what you told your employer?

"Mr. Shelton. It is my understanding, sir, that the first amendment is the door to America's freedom of conscience. It is just as strong and secure a door as that on the house [fol. 127] of the chairman in Doddsville, Mississippi. It can be opened at will any time from within; it cannot be forced open with the wedges of a subpoena, with threats of contempt citation, or in any other form.

"Mr. Sourwine. Assuming that all that is true, sir, which is questionable in your instance, why are you refusing to open that door before this committee?

"Mr. Shelton. I believe that I have fully set forth my reasons in the statement that I have just read to the subcommittee.

"Mr. Sourwine. No, sir; in answer to that question, what you have said amounts to a statement that you are refusing to tell us because you have a right to refuse to tell us. That is non sequitur. That is no reason. I am asking you, why are you availing yourself of the right you assert here to refuse to answer that question?

"Mr. Shelton. May I consult with my counsel, sir?

"Mr. Sourwine. Surely.

"(The witness consults with his counsel.)

[fol. 128] "Mr. Shelton. This happens to be a matter of principle, and I think it is a very important principle that

is involved here. I have explained the principle and how I feel about the principle in my statement. I am standing on the principle and I am standing on the statement.

"The Chairman. I order and direct you to answer the question, sir.

"Mr. Shelton. I refuse to answer the question, sir, on the basis of the grounds set forth in my statement.

"Mr. Sourwine. I have no more questions, Mr. Chairman.

"Senator Welker. No questions.

"Senator Jenner. I have no questions.

"The Chairman. You may stand aside. You are released from the subpoena.

"Who is the next witness?"

Mr. Hitz: Excuse me just a moment. I think that is all, Mr. Sourwine, to read.

No further questions, Your Honor.

The Court: You may cross examine.

[fol. 129] Cross examination.

By Mr. Rauh:

Q. Mr. Sourwine, what is your present occupation? I may have gotten some of this before. I don't recall exactly what you testified to.

A. I am associate counsel of the Internal Security Subcommittee of the United States Senate.

Q. How long have you held that position?

A. Since October 1st of this year.

The Court: You mean last year, Mr. Sourwine.

The Witness: Yes, sir. I am still dating my checks 1956.

By Mr. Rauh:

Q. Am I correct, that your position at the time the defendant was interrogated was chief counsel to the Internal Security Subcommittee?

A. That is correct.

Q. And how long did you hold that position after Mr. Shelton was interrogated?

A. Until the end of January, 1956.

Q. And why did you resign?

A. I resigned for personal reasons.

Q. How long had you held that position before the defendant was interrogated?

A. I am not sure about the length of time I had the [fol. 130] title. I think I took the title in the fall of 1954. I was counsel of the Judiciary Committee of the United States Senate and, as such, had a measure of supervision over the Internal Security Subcommittee, the affairs of which were more directly controlled by an associate counsel of that committee, and there was no chief counsel. After Senator McCarran died, which was September 20, 1954, I was appointed chief counsel of the subcommittee and devoted my full time to subcommittee affairs thereafter.

Q. How long had you been, prior to '54, counsel to the Judiciary Committee?

A. I have been with the Judiciary Committee since 1944, in one capacity or another. I think I first got the title of chief counsel in 1948, but I am not sure without checking.

Q. And was Senator McCarran responsible for your appointment in '44?

A. Yes, sir, there is no doubt about it. He became chairman of the Judiciary Committee in '44. I had been counsel of the Committee on the District of Columbia, of which he had been chairman prior thereto.

Q. And you went up to these different jobs, higher and higher, with Senator McCarran?

A. I moved to the Judiciary Committee when he did. I did not at that time become counsel. There was no counsel. [fol. 131] There was a clerk, and I served as counsel for various subcommittees of the Judiciary during the period of a year or a year and a half.

Q. And then he appointed you to this higher position—

A. The committee did.

Q. —of which he was chairman?

A. That is correct.

Q. Now, did you draft S. 366?

A. Yes, sir, I did.

Q. And then subsequent to the adoption of that resolution by the Senate, in your role as counsel to the Judiciary Committee, you supervised the work on S. 366; is that fair?

A. I had general supervision over it, sir. I did not have direct responsibility for all the work of the subcommittee, but I was, I think, kept fully advised. I was consulted with and I was in a position where if I had ordered something stopped in the subcommittee, it would have been stopped, until a Senator said otherwise.

Q. Now, Mr. Sourwine, would you please state as accurately as you can remember all the information the subcommittee had about the defendant on the date the subpoena was issued to Willard Shelton? Is my question clear?

A. Your question is clear. I think it has an inherent defect, but perhaps I can get at that in my answer agreeable to you, sir. The committee had at the time the subpoena [fol. 132] was issued information that a man named Shelton, who was employed in the news department or city side of the New York Times, was a member of a communist group on the Times, was active in the affairs of that group, and would be or should be in a position to give the committee information about the activities of that group.

Q. Now, that is all there was?

A. That is correct.

Q. You didn't have any more information about it than you have now given us?

A. That is correct.

Q. When was this information given to the committee?

A. I am unable to give a precise date, sir.

Q. Was it two months before he was subpoenaed, three months, one month?

A. I think the information came to the committee within the period between thirty days and ninety days before he was subpoenaed. I would be unable to place it much closer than that.

Q. Did it come in orally or in writing?

A. The information came to the committee in writing.

Q. By letter or memorandum or was this document signed?

A. It came by letter, sir.

Q. Have you looked at that letter since you knew you [fol. 133] were going to testify here?

A. No, sir, I have not.

Q. Was this solicited or unsolicited?

A. It was an unsolicited letter.

Q. Did you make any efforts to talk to the writer of the letter?

A. I did not.

Q. You didn't check at all on someone who gave you information that this man might have been, as you put it, a member of a communist group?

A. Well, we attempted to call the gentleman as a witness, sir, and question him about it.

Q. Oh, you did call him as a witness. Did you subpoena him?

A. No, no. We attempted to call this gentleman who was named as a possible witness.

Q. If I wrote you a letter and said that Mr. Hitz was a communist, would you call him or interrogate me?

A. I think I would interrogate you, Mr. Rauh.

Q. Why didn't you interrogate the author of this letter, instead of calling Mr. Shelton?

A. Because his identity was not known to me, sir.

Q. You mean this was an anonymous letter?

A. Yes, sir. It was signed with a pseudonym.

Q. That couldn't be a very confidential document, could [fol. 134] it?

A. Yes, sir, I think it could be highly confidential.

Q. Is that letter presently in the files of the Senate Internal Security Committee?

A. I am unable to say for sure, but I doubt it.

Q. Why do you doubt it?

A. I think it is locked in the safe of the present chief counsel, Mr. Robert Morris.

Q. Isn't that in the files of the Internal Security Committee?

A. I think it is in the archives of the committee. It is in the possession of the committee. I was attempting to distinguish as between the files, sir.

Mr. Rauh: If Your Honor please, we would like to have this letter produced. It is an anonymous letter. There is no possibility of giving away any secrets of the Government. Indeed, my subpoena would have called for it. I don't want you to get me wrong, sir. I am not rearguing the subpoena. I am saying that here is an extremely important part of

our case. There is no possible identification of an informer, because this letter is anonymous. We would like to examine it to see whether it in any way conflicts with the testimony given here, and if you would like, I will withhold that until I make certain other questions which will relate to the importance of this. I may have made this request too soon, [fol. 135] Your Honor.

By Mr. Rauh:

Q. You don't remember the date on this letter?

A. No, I am sorry, I don't. It was one of a number of letters which was received from this same individual.

Q. Oh, you received a number of letters?

A. That is right.

Q. Were some of the other defendants—I mean, some of the other witnesses called as a result of anonymous letters?

A. Yes, sir, of letters from this same individual. I might say that the word "anonymous" I can't accept, because the identity of this individual was known to the then associate counsel of the subcommittee.

Q. I am sorry, I must have misunderstood. I thought you said you couldn't interrogate this man because you didn't know his identity.

A. I didn't, and I don't today.

Q. But the associate counsel knew it; he could have interrogated him, couldn't he?

A. Yes, sir.

Q. Why didn't he?

A. I don't know whether he did or not.

Q. I am not clear on your testimony, Mr. Sourwine. I had understood you to indicate that the committee was unaware of the identity of the man who wrote the anony- [fol. 136] mous letter about Mr. Shelton. Am I wrong?

A. You are incorrect. I am only answering your questions. I am not attempting to indicate anything. I will answer your questions as directly and as fully as I know how.

Q. What did the committee or any member of the committee know about the identity of the anonymous author of the letter about Mr. Shelton?

A. So far as I know, no member of the committee knew the actual identity of the person who gave us that information.

Q. And what was it that the associate counsel knew that you just told us about?

A. He knew the identity of the individual who had furnished this information, who had written us several letters providing us with information and leads.

Q. Would you please elaborate on the difference between knowing the identity of a person and knowing who it was? I am sorry, I just don't get it.

A. Well, the distinction is not at that point, Mr. Rauh. The distinction you should get is between a member of the committee and committee counsel.

Q. All right, I will put the question again. What did any member of the staff of the committee know about the identity of the man who wrote the letter about the defendant?

A. Beyond the fact that Mr. Morris knew the identity [fol. 137] of the writer of the letter, I do not know what else he knew about him.

Q. Did you know at that time that Mr. Morris knew the identity of the man who wrote the letter?

A. Yes, sir.

Q. Now, back to where I started: Since you knew that the committee knew the identity of the letter, why didn't you interrogate the man who wrote that letter, instead of issuing a subpoena without checking on that?

A. Because we already had received enough information from him which checked out to indicate that his leads were good, and because Mr. Morris knew who he was and said that he was a reliable person who was attempting to assist the committee.

Q. Was this man ever called?

A. What man, sir?

Q. The man who wrote the letter.

A. I don't think so, but since I don't know who he was, I am not even in a position to say he was never before the committee.

Q. Do you happen to remember when it was that Mr. Morris resigned to become a judge?

A. I am sorry, at the moment I do not.

Q. Well, I don't know either. That is why I asked the question. What was Mr. Morris' position at the time?

[fol. 138] A. At what time, sir?

Q. At the time that this letter was received.

A. At the time that this particular letter was received, I believe Mr. Morris was a judge of the City Court of New York.

Q. What did you do, then: you took this letter up to him on the bench and said, "Is this a reliable letter?" Is that what happened?

A. No, sir, that is not what did happen.

Q. Will you tell me what did happen?

A. I didn't do anything with regard to Mr. Morris, sir. We had received other letters from this same individual. I knew by the appearance of the letter, the way it was typed and the pseudonym which was signed to it, that it came from this same individual who had given us leads before which proved out and concerning whom Judge Morris had stated that he knew him and that he was a reliable person.

Q. Did you know it was the same person from the handwriting or the pseudonym?

A. I told you the basis for my judgment, sir, from the typing of the letter and the pseudonym. I am not a handwriting expert.

Q. But from both the typing of the letter and the pseudonym, you knew it was the same person?

A. I think there was another clue. The tone of the [fol. 139] letter was quite familiar. It was written the same as the other letters. I was convinced in my own mind that it was from the same individual.

Q. Why did you issue a subpoena, then, to Willard Shelton?

A. Aside from the fact that I don't issue subpoenas, they are issued by the chairman, I am unable to answer that question. There was an error there, a culpability which I have tried very hard to place, and I am unable to place it. I have surmised about it. If you want my surmises, I will tell you.

Q. I will be happy to have your surmises.

A. Somebody in the typing section at some point, having the name Shelton and not having the first name, asked somebody else, "What is this fellow Shelton's first name?"

Somebody else said, "What, what Shelton?"

He said, "The newspaperman Shelton."

And somebody who knew that there was a newspaperman named Willard Shelton said, "Willard."

Now that is wholly a guess. The name Willard was in error. There is a Willard Shelton, and Willard Shelton is not the person we intended to subpoena.

Q. Did the letter have a first name?

A. No, sir.

Q. Did it ever occur to you to ask Judge Morris to [fol. 140] find out what the first name was?

A. Yes, sir.

Q. But you didn't do that?

A. I don't recall that I did that, sir, no.

Q. Do you ordinarily start writing up subpoenas with only a last name?

A. No, sir.

Q. Was this an exceptional case, then?

A. Well, I would say this is an extremely exceptional case, yes, sir.

Q. Now, you said you don't issue the subpoenas.

A. That is right.

Q. Who does?

A. The chairman in each instance.

Q. Does he give them to you in blank and you type the names in?

A. No, sir, he does not. A list of proposed witnesses in this instance, and this is the course followed in most instances, went up to the chairman's office. The chairman approved that list. The subpoenas were then prepared by the stenographer and were then sent up to the chairman for his signature. I don't know of an instance where the chairman has signed a subpoena in blank.

Q. Are you familiar, Mr. Sourwine, with the piece entitled, "Strategy for Inquiry and Analysis of the Key Role [fol. 141] Sourwine has taken at Hearings on Communists," written by James Reston of the New York Times, and

appearing Friday, January 6th? I show it to you to refresh your recollection about it.

A. Yes, sir, I have seen that news story. I think they call it a "profile."

Q. I would like to read two paragraphs of that story and ask you if you want to change your testimony:

"When more than fifty subpoenas were issued to people in the press, radio and other fields of communication on behalf of the committee last November, Mr. Sourwine was the only person who seemed to know anything about them. They were issued under the name of Senator Eastland, but when this reporter called the Senator about them, he said he did not know they had been issued, did not know the hearings had been called, and said he would have to call Mr. Sourwine to find out the facts."

Would you care to change your testimony?

A. Not in the slightest, sir.

Mr. Hitz: Would you give the date of the newspaper [fol. 142] article?

Mr. Rauh: Friday, January 6th. I think I did.

Mr. Hitz: Of what year?

Mr. Rauh: Of '56.

By Mr. Rauh:

Q. Would you care to explain this? Is Mr. Reston in error?

A. I don't think it requires any explanation, Mr. Rauh, and I don't think that a newspaper print account of what a reporter says, when it is unsworn testimony, will refute my testimony. I know what I am talking about, and I am giving you the testimony from what I know.

Q. Do you think that Mr. Reston incorrectly quoted Senator Eastland?

A. I have no knowledge as to whether Mr. Reston ever talked with Senator Eastland.

Q. But Mr. Reston reports very cautiously here that Senator Eastland said he knew nothing about these subpoenas. Are you or Senator Eastland or Mr. Reston wrong here?

A. Mr. Rauh, I am only testifying to matters within my knowledge in response to your questions. If you want to draw conclusions, you will have to draw them. I might say that I don't think Mr. Reston was at that time particularly friendly towards Senator Eastland.

Q. Are you suggesting that he would have said he talked [fol. 143] to him if he had not?

A. No, sir, I am not suggesting anything of the sort. I believe Mr. Reston to be a responsible and reputable newspaperman.

Q. And yet if he correctly quotes Mr. Eastland, you just committed perjury; isn't that correct?

A. Mr. Rauh, I have committed no perjury.

Q. In other words, you say that he misquotes Senator Eastland, I take it?

A. You said so, sir.

Q. Well, I am trying to get some conformity between your testimony and this statement by a man you refer—

The Court: I think the witness has answered your question.

Mr. Rauh: Mark this as our Exhibit 1 for identification.

(Defendant's Exhibit 1 was marked for identification.)

By Mr. Rauh:

Q. I show you Defendant's Exhibit No. 1 and ask you what it is?

A. This appears to be a subpoena issued to Willard Shelton, New York Times, New York City, New York.

Q. And is that the subpoena which the Senate Internal Security Subcommittee issued to Mr. Shelton?

[fol. 144] A. It certainly appears to be, sir, that is all I can say. There is no return on the back of it.

Q. Is there anything else on the top of that, right after the words "Willard Shelton, New York?"

A. Yes, sir. Someone has written in in ink, "or Robert Shelton."

Q. And who is that someone, if you know?

A. I do not know.

Q. You have never seen this document before?

A. I don't believe so, sir. I think the subpoenas in this case went directly from the stenographic office downstairs to the Senator's office upstairs and then were served. I don't believe they came back over to my desk.

Q. Who went to New York to serve this subpoena?

A. Mr. Charles Halleck, Jr.

Q. Did Mr. Halleck call you at any time from New York after he had found out there was no Willard Shelton on the Times?

A. He did.

Q. Did he ask you for instructions as to what to do?

A. Yes. "Chuck" said—I beg your pardon, Mr. Halleck—we call him "Chuck"—said that he had been told there was no Willard Shelton on the Times, that there were several Sheltons up there and only one of them on the news side. And I told him we would give him instructions, and we [fol. 145] made arrangements to talk later on in the day, and I checked with the chairman. My recollection is that I had some difficulty reaching him by telephone, and the chairman said, in effect, "Do you think that the Shelton up there is the man we want?"

And I said, in effect, "He must be. He is the only one on the news side, and the Shelton we want is on the news side."

And he said, "Well go ahead and tell him to come."

And when I talked with "Chuck" later on, I told him to tell that Shelton that he was the man we want.

Q. And you authorized him to write in the words, "or Robert Shelton?"

A. There was no discussion about the writing in of the words. Mr. Rauh, this may be helpful to you, sir. The summons from the committee is only evidenced by that subpoena, and there are many other methods of summonsing we could use. We attach less importance to a subpoena as such on the committee on the Hill than would be the case if it were a court subpoena for appearance, where the whole authority would be in the subpoena, and if there is a defect in the subpoena, there would be something wrong with the summons. In our case, the authority of the Congress is exercised when the witness is apprised and believes that the committee wants him to appear at a certain time.

[fol. 146] Q. Did you know that the subpoena had been made out to Willard Shelton?

A. Yes, sir, I knew it when Mr. Halleck called me and told me.

Q. Did you know it before that?

A. I am not sure. I probably did, I, like everyone else—apparently, as near as I have been able to ascertain, after the name Willard got into this list, it rolled with everybody. Everybody who knew about the affair and knew there was a Willard Shelton—assumed well, he is working for the Times; now that must be the man.

Q. As I understand it, it is your testimony that you sent a list of names down to the stenographic office, they typed up the subpoenas, and then they went to the chairman to be signed, and then they went to be served; is that correct?

A. No, you left out one step. The list was first approved by the chairman.

Q. And was the word "Shelton" blank in that list or was "Willard" on it?

A. No, I am sure the word "Shelton" was not blank in that list.

Q. The word "Willard" was on it?

A. It must have been, sir.

Q. So you took that list up for approval to the chair-[fol. 147] man?

A. Yes, sir.

Q. So you believed it was Willard at that time, didn't you?

A. Yes, sir.

Q. When did you last see Mr. Halleck?

A. I saw Mr. Halleck here in court at the opening of this session.

Q. And prior to then?

A. I saw him during the noon hour.

Q. And prior to then?

A. It has been several months.

Q. When did you last talk to him on the telephone?

A. I think Thursday or Friday of last week, I am not sure which.

Q. Did he tell you that we had contacted him and asked him to testify for us about the service of this subpoena?

A. That is right.

Q. Would you relate that conversation, please?

A. Yes, sir. Mr. Halleck called me and said he had been asked by you to come down to your office, that you wanted to take a deposition. I told him I was unable to understand that, since he was available to testify in court. He said he had told you that he was afraid that there were aspects of what he had done that were confidential to the [fol. 148] committee and that he had told you in effect that he would have to think it over, he didn't want to talk with you at that time.

And I told him I thought he had taken exactly the right course, and he asked me what I would advise him to do, and I advised him to pursue the course he had followed and to tell you that he would testify if you subpoenaed him but that he wasn't going to come down to your office for any conference at your disposal.

Q. You told him not to come down and discuss it?

A. I have told him exactly what I have already testified to.

Q. You told him not to come down and discuss this with us; is that correct?

A. I have told him exactly what I have already testified to. I did not use the words, "do not go down."

Q. Was that the purport of it?

A. The purport of it is exactly as I have outlined it, Mr. Rauh.

Q. You are unwilling to say whether I had correctly stated the purport of your testimony; is that correct?

The Court: I think the Court understands the witness' answer. If there is anything in addition that the witness recalls, why, he may state it. I thought he gave you a full answer, counsel.

By Mr. Rauh:

[fol. 149] Q. Was there any reference to the testimony that Mr. Halleck would give here?

A. No, sir.

Q. Was there any reference to the event about which Mr. Halleck would testify, namely, the service on Mr. Shelton?

A. Yes, sir, I think there was. I think Mr. Halleck told me what it was you wanted to ask him about.

Q. And did you discuss that?

A. No, sir.

Q. The sole matter you discussed, am I correct, was whether he should come to my office to go over this testimony; is that correct?

A. Yes, sir. Wait a minute now. I think Mr. Halleck did ask me whether when he called he had talked with me or Mandel the first time, and my recollection is that I told him that I thought he had talked with both Mandel and myself the first time he called.

Q. Now that one addition you gave us, that one sentence, is that the only thing there was in addition to the question of whether he should come to my office and discuss it or is there still more, Mr. Sourwine? After all, this conversation was only last Thursday, not years ago.

A. That is correct, and the conversation was not very lengthy, and I have given you the substance of it, Mr. Rauh.

[fol. 150] Q. Then it is your testimony the only two things were the question of coming to my office and did he talk to you or Mandel on the telephone when he called back; is that correct?

A. Mr. Rauh, I am unwilling to have you summarize my testimony for me and accept your summary of it.

Q. Well, I will accept your summary, then. I would like to have it perfectly clear on the record.

A. Well, I have tried to make it perfectly clear on the record.

Q. Will you now repeat it, please?

A. Yes. Mr. Halleck called and said that he had been reached by a Mr. Sillard or Silard on the telephone, that Mr. Sillard or Silard wanted him to discuss the circumstances of his service of this subpoena and had wanted him —I understood him to mean on the telephone—and also had wanted him to come down to your office and give a deposition, and I said I couldn't understand what he meant by deposition, because he was available here to testify. And

he said that he had told you that he thought some of the circumstances, at least of his service, were confidential to the committee, and he wasn't sure what he could give you, and that he had told you he thought he had better think it over, and he asked me what I would advise. And I said that I thought he had done it correctly and that I would advise that he tell you that he would testify if you sub- [fol. 151] poenaed him but that he wasn't going to come down to your office and give any information.

Now I think it was at that point, after we had more or less settled, so to speak, the question, that he asked whether he had talked with me or Mandel when he had called the first time. I told him that I remembered that he had talked with Mandel and myself both. I don't remember that he asked me anything else or that I said anything else to him.

Q. And there was no further discussion of this at noon today?

A. At noon today, I was having lunch with Mr. Hitz. "Chuck" came in and I spotted him, and I said, "Hello, 'Chuck'." We were sitting fairly close to the aisle where people go through. And I said, "Are you going to testify?"

And he said, "Yes."

And I said, "Well, sit down."

He said, "Wait until I get a cup of coffee."

He went and got a cup of coffee and he came back. We then did discuss the fact that he had been called to testify.

I asked him if he had been subpoenaed.

He said no, he had not been.

I said I hadn't expected to see him here unless he was subpoenaed.

He said well, he was going to be subpoenaed, that you had said you were going to subpoena him and had asked him [fol. 152] as a matter of convenience to come ahead and that you would give him the subpoena after he got here, and he said he was just about to cooperate to do that.

If you are trying to reach the question if there was at that time any discussion of what I had testified to or as to what he should testify to, there was not.

Q. Now, Mr. Sourwine, you testified this morning and read us your examination of Mr. Shelton in executive session.

A. Yes, sir.

Q. Why did you ask him, if you had this letter you have referred to, "Were you ever Washington correspondent for PM or in any way connected with PM?"

A. I did that in line with establishing his identity and with gathering additional information for the committee. Now let me explain that. I will tell you what I mean.

We had in the committee under the name of Shelton three or four or five leads which did not have a first name. We had here a man who was Robert Shelton, who was a newspaperman. It was of some importance to the committee, while he was on the stand, to ascertain whether he was the same person as any of these other individuals. It is a procedure which we follow wherever it is possible, where time will permit: we have a witness who may be the same as a person not adequately identified in our files. We ask a question or questions for the purpose of establishing that, because even if we learn that he is not, we have ac- [fol. 153] complished something in getting a little further with our investigation. Does that answer your question?

Q. Are you finished?

A. Well, I am if you are satisfied.

Q. Did I understand you to say you had three or four or five leads by the name of Shelton that did not have a first name to it?

A. That is right.

Q. Could you tell us what these other leads were? The only one you have mentioned so far is this anonymous letter. What other things did you have in your file?

A. You were talking about different times there. The anonymous letter was all that we had about this individual, about the man we wanted who was on the New York Times, at the time that the subpoena was issued. Now, between that time and the time that Mr. Shelton appeared, we made a thorough check of all the sources that were available to us to see what there might be on a Robert Shelton or what there might be on a Shelton who might be the Robert Shelton that we were talking. And we accumulated those things from all the sources available to the committee and then attempted in the hearing to see if this was the same individual.

Q. You attempted this between the issuance of the subpoena and December 7th?

[fol. 154] A. That is right.

Q. Then why, Mr. Sourwine, did you say, when he pleaded the first amendment, "I am taken by surprise?"

A. Well, I was. I was very much taken by surprise. I had not expected him to take any such action. As a matter of fact, at that time, right at that point, he had already by the answers to the questions indicated that he was not the same as the individuals that we had these other leads on. His answers taken at their face value had shown that he was not the same person as was referred to in these other items that I have referred to as leads. His demeanor was very forthright. He was obviously a highly intelligent person. He showed great, but well controlled, annoyance at having been called, and I was at that point ready and willing to believe, and almost did believe, that we had made a mistake. I had in the back of my mind the consciousness that there had been an error in this initial subpoena. I had, I suppose, a guilt complex about it, and I was just about convinced that we had the wrong man altogether at that point.

Q. Well, what about this anonymous letter you had that said he was a member of a communist group?

A. This anonymous letter, sir, identified a Shelton as such a member. We were attempting to reach that Shelton. At one time I thought we had arrived at that, because we had narrowed it down to the fact that there was only one [fol. 155] Shelton on the news side, on the editorial side, on the New York Times. Then the witness came in, and from his appearance, his demeanor and the way he handled himself, he sold me that he wasn't the man we were looking for at all, and when he showed that he was by going off with this typical statement, I was a very flabbergasted individual.

Mr. Rauh: May I have Government's Exhibit 6, if you please?

The Court: The Court will take a recess for about ten minutes.

(Whereupon, a short recess was taken.)

The Court: You may proceed, counsel.

Mr. Rauh: At the recess, I was asking for Government's Exhibit 6, please.

By Mr. Rauh:

Q. Just before the recess, Mr. Sourwine, I believe you said—you may correct me if this is not right—that it was the defendant's demeanor and handling of himself at the executive hearing which caused you to believe there had been a mistake; is that correct?

A. In part, that is correct, yes, sir.

Q. What is the other part?

A. His answers to the questions, which, taken at their face value, indicated he was not the individual that was covered in any of these leads we had. In other words, his [fol. 156] answers taken at face value had narrowed the thing down, until all we had was the information from the confidential informant, and there had been a mixup initially, and this man presented a very fine appearance, and with a combination of those factors, I had arrived, or almost arrived, at the conclusion that we had a man who knew nothing about communism and was not going to be able to give us any information.

Q. I hand you Government's Exhibit 6, Annex 1, of which is the testimony of Mr. Shelton in executive session, and ask you to point to those places where the defendant showed you that he was handling himself well, he was not a communist, and so forth.

A. I might say offhand that you are attempting initially to require of me an objective proof of a subjective statement, which was the gist of my own conclusions and how things struck me. However, I can help you by pointing out that Mr. Shelton had testified to having lived in Chicago, up until the time he had been in Evanston, and he had been in Evanston. That ruled out a couple of the leads who had been elsewhere at the time. His joining of the guild ruled out at least one more, and his statements of his employment, if they were inclusive, and his testimony was that they were inclusive, ruled out another one.

At that time, he had by his answers ruled out the leads we had to other Sheltons who had had communist connec-

[fol. 157] tions. We had then only the lead that we had started with, and perhaps I was unjustified in having arrived at the conclusion, but I had arrived or virtually had arrived at the conclusion that this was not the man, that we would have to start over, that somebody "bobbled" again.

Q. What in that testimony led you to believe that the anonymous informer was wrong and you had the wrong fellow?

A. No one thing, sir. I have attempted to explain it.

Q. I beg your pardon, your testimony was about the other leads. What in there led you to believe that the letter from the anonymous informer was erroneous?

A. My answer is, no one thing.

Q. Well, give me the group of things that led you to believe.

A. I have already done so, sir.

Q. Will you repeat it?

A. If you will pardon me, it is your statement that I reached the conclusion that the testimony of the anonymous informer was erroneous. I never reached that conclusion. The conclusion I reached was that we had the wrong man and we had a man who was not in a position to give us information about the communist conspiracy.

Q. And what in there led you to believe it?

A. The fact that this witness, Mr. Shelton, was ap-
[fol. 158] parently testifying with openness and frankness, and that his testimony was believable, and that he had eliminated himself on the basis of his testimony taken at face value from any connection with the other individuals named Shelton whom we knew to be communist, and I just wanted one more question. If he had answered "no" to the question as to whether he was a member or had been a member of the Communist Party, I would have been willing at that time to have accepted it at face value. I would then have concluded, I think, that some way, somehow, we had made a mistake and we had not brought before us the Shelton that our informer had brought to us.

Q. Isn't it a fact, Mr. Sourwine, there isn't one question in there that you could say his answers were such that it would have given you such a feeling? There isn't one

question here about communism, is there, until he pleads his privilege?

A. Now, split that question up and I will answer both parts. There is nothing in here about communism, but I was present, sir, and you asked me what my conclusions were, and I have testified to it, and the fact that I had that reaction is the fact.

The Court: I think that is about all the witness could say, counsel. He has given you an answer to the question: whether you accept it or not is another thing.

Mr. Rauh: I will put the question this way, if Your [fol. 159] Honor please:

By Mr. Rauh:

Q. Will you point to one question that he answered that demonstrated to you that you had the wrong Shelton, based on the fact that you previously had a tip that there was a man on the Times who was a communist? Point to one question. That is all I am asking.

A. I am sorry, that question isn't susceptible of an answer. You will have to rephrase it, sir.

Mr. Rauh: I ask that it be answered, if Your Honor understands it.

The Witness: Will the reporter read it back?

The Court: You may read the question back, Mr. Reporter.

(Question read.)

Mr. Hitz: I object to that. I don't see how the witness can understand it; I am sure that I can't.

Mr. Rauh: I will rephrase it, if counsel objects.

By Mr. Rauh:

Q. At the time Mr. Shelton testified, you had a statement, you have testified here, from an informer believed by you to be reliable, to the effect that Mr. Shelton had been a member of the communist group; is that correct?

A. That is not correct.

Q. Will you state it as—

[fol. 160] A. At the time that Mr. Robert Shelton testified, we had information from this informant believed to be reliable that there was a Shelton on the New York Times who was active in communist affairs, and he was on the news side, and that he was in a position to give us information. We had attempted to bring that Shelton before us because we wanted that information.

I arrived subjectively, as I have indicated to you, after some preliminary questioning here, and after we had eliminated these other leads, at a state of mind where I was willing to accept, and in fact anticipated, a statement from the witness that he had not been a communist and knew nothing about communist activity, and if I had received such a statement, since it was what I would have expected, I would have dropped the questioning right there.

Now, Mr. Rauh, it is not a question of one witness. I have questioned a lot of witnesses. I am not trying to set myself up as an expert, but I have had some experience, and out of that experience there grows a feeling as to when a witness is telling you the truth and when he is fencing with you. One of the indicia of these communists is the way they fence with you. This witness did not appear to be fencing. He is a clean-cut college boy type, and he appeared to be giving a straightforward answer, and all of the answers were such that if I believed them, they helped to take him further and further away from [fol. 161] the communist area. The answer by itself doesn't mean anything. The question by itself doesn't mean anything perhaps. But bearing in mind the information which was available to me—for instance, in one case there was a man by the name of Shelton who had lived in a community in the southwest, who was known to be active in the Communist Party. Shelton was one of his aliases. He was approximately in the age group of this man, but that man was known to have been for some years in the southwest. This man had lived during that same period, according to his testimony, in Chicago. So it eliminated that.

As I eliminated all of these things, I arrived at the conclusion that this was not the man; this was not the

man we had tried to get, and I would have retained that conclusion, I think, I would have accepted it, if he had answered the question about communism by stating that he was not a communist and had never been a member of the party.

Q. Isn't it a fact—I ask you to look at Page 4 of Government's Exhibit 6—that the first question you asked Mr. Shelton after his education and location, he raised a question of pertinency?

A. This testimony has all been read. I don't think that is absolutely correct. The first question I asked him was his name and whether he had a middle initial. Then I got his address. Then I got his business. Then I asked him how [fol. 162] many copy editors there were. Then I asked him how long he had been employed there. Then I asked him about his prior employment. I hadn't yet reached education. We covered prior employment in several questions. I asked him if he was a college graduate, and he said he was. And I asked him where. Then I asked him about residence. Does that answer your question?

Q. What was it in any of those questions that made you think you might have the wrong man?

A. No one of those questions standing alone made me think.

Q. What was it in the totality of it?

The Court: I think the Court will have to take a hand in here, counsel. I think he has answered that question about four or five times. There is no use in continuing to pursue the same—

Mr. Rauh: If Your Honor please, at this time, I would like to request the production of the letter which counsel has testified to that included, I take it, the statement a man named Shelton, employed in the news department of the New York Times, was a member of the communist group on the Times, active in its affairs.

I base that request on the fact that the initial subpoena to Willard Shelton, who was a prominent and respected newspaperman in the City of Washington—and the cross [fol. 163] examination of Robert Shelton demonstrates that the letter, while some letter may exist, could not possibly

have been in those terms, because had they been in those terms, it would never have been a case of mistaken identity with Willard Shelton and could never have created the cross examination which occurred at the time the defendant appeared before the executive session.

The Witness: I am sorry, Mr. Rauh, I can't give you that letter. It is confidential and it contains information outside of this case which is confidential to the committee.

Mr. Rauh: If Your Honor please, now the sole question is one of whether we are entitled to it if it is not confidential. The Government can prosecute or not prosecute. But the cases are clear, and I would like to submit a memorandum, if there can be any question on it. The cases are clear that when the Government comes into court to prosecute, if there is a document that will aid the defense and it is material, the Government's choice is to drop the prosecution or make it available. Therefore, if we are correct in our contention, Mr. Sourwine's belief that it is confidential is not the answer. What is the question is whether we are entitled to this, apart from Mr. Sourwine's belief, and on that, it seems to us, we have made our case.

Mr. Hitz: Your Honor, we object to the demand made [fol. 164] for the reason that it is not material to this issue. The truth of what that document may state is not in issue, and in addition to that, the subject matter is not material, because it makes no difference whether there were reasonable grounds for this witness to have been called before the committee. It is not the pertinency of an individual, that is, the relevancy of an individual, or the information he may have that is important. It is the pertinency of the inquiry, if pertinence may be made of anyone, with or without probable cause.

The Court: The objection will be sustained. You may proceed.

Mr. Rauh: If Your Honor please, I don't know why I am so unduly worried about Mrs. Halleck and the boy, but I am concerned—

The Court: Counsel, the Court has sustained the objection.

Mr. Rauh: Oh, no, I am sorry. I was going to make a different point. I was going to say that young Halleck is still around, and I think possibly Your Honor might want to put him on this afternoon, because he has this problem of bringing his wife and baby home tomorrow.

The Court: Oh, yes, if you want to call Mr. Halleck, if you call him now—

Mr. Rauh: I am just trying to accommodate the fellow.

[fol. 165] The Court: Yes, well, that is perfectly all right.

Mr. Hitz: There is no objection.

The Court: There is no objection. Even if there was objection, the Court would overrule it.

Mr. Sourwine, you may step aside for the moment.

Mr. Hitz: Do I understand the cross examination has not been finished?

Mr. Rauh: It has not been finished.

Mr. Hitz: I see.

Thereupon CHARLES W. HALLECK was called as a witness by and on behalf of the defendant, and after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rauh:

Q. Mr. Halleck, would you please state your full name?

A. Charles W. Halleck.

Q. And your address?

A. My home address is 5108 Nahan Street, Washington 16.

Q. What is your present occupation?

[fol. 166] A. I am a law student.

Q. Where?

A. George Washington University.

Q. Were you employed in the past by the Internal Security Subcommittee?

A. I was.

Q. From when to when?

A. I couldn't give you the exact dates. It was approximately a year, the duration of a year, and concluded—my employment concluded a year ago.

Q. You were employed by the Internal Security Subcommittee on November 14, 1955?

A. I presume so, yes.

Q. What was your position at that time?

A. I was research assistant to Mr. Benjamin Mandel.

Q. And you did engage in serving subpoenas, too?

A. I did.

Q. Did our office contact you last week with respect to the subpoena you served on the defendant in 1955 and the possibility of your testifying at the trial?

A. You did.

Q. And thereafter, did you have a conversation with Mr. Sourwine?

A. I did.

Q. After speaking with Mr. Sourwine, did you report [fol. 167] to our office that you were a hostile witness and reluctant to testify?

A. I don't believe it was quite in that tone. I tried to convey to you, sir, I wasn't particularly sympathetic, but I would tell whatever I knew as truthfully as I could remember.

Q. I was making no assertion to the contrary. The word that I particularly remember Mr. Silard telling me you used was that you were a hostile witness; is that fair?

A. I don't remember whether I used that word or not.

Mr. Rauh: If Your Honor please, we would request the right to cross examine Mr. Halleck as a hostile witness, instead of having to examine him—

The Court: Well, I believe on the theory of leading questions, you may proceed, if I think it is material.

Mr. Rauh: Thank you, sir. I don't know if it is particularly necessary, but since we felt that the word had been used, we make this request.

By Mr. Rauh:

Q. Do you recall serving subpoenas for the Internal Security Subcommittee on or about November 16, 1955 upon employees of the New York Times?

A. I don't have a particular recollection of the date exactly. I guess it was about that time. I did serve sub-
[fol. 168] poenas on employees of the New York Times.

Q. I show you Defense Exhibit No. 1 and ask you if this is the subpoena that you served upon the defendant?

Mr. Hitz: Mr. Rauh, might I ask, is that an identification exhibit or has it been offered and received?

Mr. Rauh: No, it is still an identification exhibit, because I didn't offer it after Mr. Sourwine implied he had not seen it.

The Witness: I presume so. This must be, if it is—it must be the copy that would have been left with the defendant, because any service of subpoena that I made and returned would have had the back filled out with the return on it.

By Mr. Rauh:

Q. Is this your handwriting on there?

A. It looks like it might be, yes.

Q. The words, "or Robert Shelton," are those three words in your handwriting, Mr. Halleck?

A. I believe they are, yes.

Offer in Evidence

Mr. Rauh: We offer Defense Exhibit No. 1 for identification in evidence.

Mr. Hitz: No objection.

(Defendant's Exhibit 1 for identification was received in evidence.)

By Mr. Rauh:

[fol. 169] Q. Now, Mr. Halleck, this affidavit is dated November 14, 1955. On or about that date, did you go to New

York with a number of affidavits for New York Times employees?

A. I don't recall taking any affidavits.

Q. I mean, any subpoenas.

A. As I say, I don't remember the exact date, but I did take some subpoenas to New York to serve, yes.

Q. What did you do then? Did you talk to someone at the New York Times about the service of these subpoenas?

A. Yes, I did.

Q. And what arrangements were made for you to serve them?

A. I went to the personnel office and told them why I was there and asked if they would help me locate the people that I was looking for.

Q. And did you ask them for Mr. Willard Shelton?

A. I believe, yes, that I showed the names, the list of names that I was going to serve subpoenas on them, and it must have been that name, too.

Q. And what did they tell you?

A Well, as I indicated to you earlier, this is all hazy in my recollection. I had no particular reason to remember this; it has been sometime ago, but as I recall—I don't know of any exact words that they might have used or anything they might have told me exactly. I gathered—well, [fol. 170] I couldn't say.

Q. Did you ask them if they had a Willard Shelton?

A. I must have, yes.

Q. Did they tell you they didn't have one?

A. I believe so, yes.

Q. You can't remember anything beyond that, Mr. Halleck?

A. I believe they indicated to me, as I recall, that there was no one there by the name of Willard Shelton but that there were one or a number of persons by the name of Shelton employed by the New York Times. I believe the subpoena is dated "New York Times, New York."

Q. That is correct, yes.

If you can remember, did you ask them if there were other Sheltons or did they volunteer that there were other Sheltons?

A. I don't remember that.

Q. Who prepared this subpoena that you took along with you?

A. I have no way of knowing. I did not.

Q. Who gave it to you?

A. Some member of the subcommittee staff at the time I was instructed to go up and serve the subpoenas. I don't recall exactly whether it was one of the girls or whether it was Mr. Sourwine.

[fol. 171] Q. You went off on this trip with all these subpoenas without remembering who it was that instructed you to serve them?

A. Well, that is understandable. I was, as I say, employed by the subcommittee, and I was sort of down on the bottom rung of the ladder, as it were, and there were several persons that were in a position to tell me to go ahead. My understanding was that the subcommittee wished the subpoenas served, and I suppose it came down through Mr. Sourwine, and one of the girls or Mr. Sourwine there gave me these and said, "Here, you are to take these up and serve them."

Q. Do you remember how many Sheltons there were on the Times, Mr. Halleck?

A. No, I don't.

Q. But there was more than one?

A. My recollection is that there was, yes, sir.

Q. Now, when you found out there was no Willard Shelton, you didn't go right to see the defendant, did you? You checked back here to Washington?

A. I can't recall exactly. I know I checked back with the subcommittee in Washington concerning the situation.

Q. That was my question. You did check back with Washington?

A. Yes.

Q. What did they instruct you to do?

[fol. 172] A. Well, as I recall, I made several phone calls. I was there, I believe, three or four days serving these subpoenas, and I called periodically, perhaps in the morning and then in the evening, and then again in the next morning and then again in the evening. As I recall, on one

of my earlier calls back, I informed—it would have been probably Mr. Sourwine or Mr. Mandel—of what the situation was, and then told them that I would await instructions until such time as I heard from them as to what to do.

Q. And then you received instructions?

A. As I recall, yes.

Q. And what were the instructions?

A. To put in the name of Mr. Robert Shelton and serve the subpoena on Mr. Robert Shelton.

Q. And at the time, Mr. Sourwine was it who gave you this instruction?

A. I believe so. As I recall, my conversations were either with Mr. Sourwine alone or with both Mr. Mandel and Mr. Sourwine.

Q. At the time Mr. Sourwine instructed you to serve Robert Shelton, did he tell you that they had information that it was Robert Shelton who was the one you were looking for?

A. He didn't tell me anything; I guess he didn't have to.

Q. He just told you to serve Robert Shelton?

[fol. 173] A. That is correct.

Q. He didn't tell you any reason why you should serve him instead of Willard?

A. No, sir, not that I recall.

Q. I believe you did testify just a minute ago that you did talk to Mr. Sourwine last week about this question of testimony.

A. Yes, after you called me, I did.

Q. Will you please relate that conversation? First, how long a conversation was it?

A. Very brief.

Q. Would you please relate it?

A. If that is proper, yes.

The Court: It is.

The Witness: Actually, I started out by telling Mr. Sourwine that I was a little concerned about my being called to testify and thought perhaps I needed a little legal advice from someone who knew what the story was and that I was inquiring of him perhaps as a client of an attorney, and then went ahead to continue my remarks under that score.

I inquired—well, as I recall, generally as to whether I ought to, in view of the fact of my employment with the committee and the work I did was what I considered of a certain confidential nature—whether or not I ought to come down and discuss this openly with you or whether [fol. 174] I ought to wait and let the judge determine whether or not what I might say might be admissible and proper, and that was about the gist of it. Mr. Sourwine, as I recall, told me that that perhaps would be the best course to follow.

By Mr. Rauh:

Q. Was anything said about the service of the subpoena on the defendant?

A. By Mr. Sourwine or myself?

Q. Yes, by either of you.

A. Well, I told him that my recollection was very hazy on it, as I have told you, that I really had no particular cause to remember what was said or anything about it explicitly, that I did remember going up and serving him the subpoena.

Q. That was all that was said in this conversation?

A. That is all I recall. We chatted along. I talked about the current condition of my wife, and he expressed interest in that.

Q. Now, what was the privileged or confidential nature of the testimony you felt that you might be able to give us?

A. I didn't particularly know. I was just caught completely off-guard by your calling me, and I was a little puzzled by the whole thing. So I thought that perhaps wiser [fol. 175] heads than mine might be able to give me a little advice as to just how I ought to conduct myself.

Q. Did you think it could possibly be privileged or confidential that you had served the defendant?

Mr. Hitz: I object. It is not relevant nor material.

The Court: I think that is for the Court to determine. You are asking for an opinion there.

Mr. Rauh: I was raising the question that there is something possibly being withheld.

The Court: The witness has told you the reason. I can't see any use in taking further time of the Court in testimony about that.

By Mr. Rauh:

Q. Did you have a discussion with Mr. Shelton at the time you served him, the defendant, that is?

A. I have been trying to think about that, and I can't remember any particular thing that might have been said. Every time I served a subpoena on anybody, naturally, you had a discussion: they threatened you or did any one of a number of things—talked at length with you. I don't remember what they might have said. You just don't stick it in their pocket and walk away from them.

Q. Isn't it a fact you said to Mr. Shelton something approximately as follows: Can you think of any reason [fol. 176] why we would be calling you?

A. I don't remember whether I did or not.

Q. Didn't you discuss with Mr. Shelton this problem of the subpoena you had for him being in the wrong name?

A. I may have, but I do not recall what was said at the time. It is in my memory that that might have been, yes.

Q. You might have said to him: Do you have any reason for knowing why we would want you?

A. I can't say whether I said that or not. I just don't remember.

Q. But if Mr. Shelton had said that was said, you couldn't dispute it?

A. Well, naturally, if I don't remember, I couldn't dispute anything.

Q. How long do you think this conversation went?

A. It could have been a minute; it could have been three minutes, five; I don't recall.

Q. Do you remember saying anything to Mr. Shelton about, were you ever a member of the newspaper guild?

A. No, I don't remember that. As I say, I don't remember any of the details of the conversation, Mr. Rauh, and you can ask me whether I asked him if he had two heads and I couldn't deny it, but I couldn't confirm it either.

Q. Let me try to refresh your recollection a little bit. [fol. 177] Did Mr. Shelton say to you, in answer to a question by you about why he might have been called, that he had opposed the discharge of Barnett? Do you remember that?

A. He might have. I don't remember it exactly.

Q. Do you remember saying that well, opposing the discharge of Barnett is no crime? Do you remember saying that?

A. No. I doubt seriously if I would have said that. I wasn't in a position to express my opinions of what was or was not correct to a witness or a person being subpoenaed.

Mr. Rauh: I have no further examination.

Cross examination.

By Mr. Hitz:

Q. Mr. Halleck, how many subpoenas did you have to serve in New York?

A. As I recall, it was in the neighborhood of thirty, and perhaps a few more.

Q. Did you have some to serve on persons who were not employed at the New York Times office?

A. Yes, I did.

Q. Did you show a list of the persons who you had subpoenas for to anybody at the Times office when you first went there?

A. I believe I indicated to them the names of the persons whom I was seeking at the New York Times.

[fol. 178] Q. Did you show them a list or did you show them the subpoenas or did you give them the names orally?

A. I don't remember that exactly. It would have been only the persons at the Times that I would have showed to them or told them, as the case may be.

Q. Do you remember to whom you spoke there on the Times about the prospective service of subpoenas as to their employees or some of them?

A. It would have been someone in the personnel office, and as I recall, I spoke to the gentleman who was the head of that personnel office.

Q. Where did you first learn the name of a man named Robert Shelton?

A. From someone in the personnel office.

Q. Themselves employed by the Times, so far as you could tell?

A. That is correct.

Q. Did you also inform that person, whoever it was, of the names of the other people who you had subpoenas for?

A. Do you mean at the Times or other than there?

Q. No, the person who ultimately gave you the name of a Robert Shelton, did you tell him who the other persons were that you intended to serve?

A. Yes.

Q. Was it before or after you gave him the full list [fol. 179] that he named Robert Shelton as an employee of the Times?

A. I couldn't remember.

Q. Did the person who named Robert Shelton to you as an employee of the Times say that likely he is the one that you want?

A. As I recall, yes. I believe there was something along that line. I can't recall that that might have been the exact words, but there was some indication, I believe, from up there in the personnel office at the Times that Robert Shelton might be the one for whom the subpoena was meant.

Q. And was that not after that person had learned from you who it was who would receive the other subpoenas?

A. It probably was, yes, sir.

The Court: Mr. Halleck, did you know, did you have any information when you left here, as to the particular department in the New York Times where the Shelton you were looking for was working?

The Witness: I can't remember exactly, Your Honor. I don't believe I did. But that wasn't information that was generally imparted to me.

By Mr. Hitz:

Q. Did they inform you in the office at the New York Times as to what part of the Times Robert Shelton worked in, whether it was the news side orbit or mechanical?

A. They must have, yes, because my primary purpose [fol. 180] in going there was—when I realized there were some 4- or 5,000 employees up there, I realized I couldn't just hunt around the building and hope to find people, and they more or less indicated to me, as I recall, where I might locate the persons that I had to serve subpoenas upon.

Q. Well, that isn't exactly what I meant. When whoever mentioned the name Robert Shelton did so, did he tell you what part of the Times he worked in, that is, what his job was generally?

A. Probably did. As I recall, they did for most of them, if not all of them.

Q. Now, of those persons, only one person was the subject of a subpoena that was apparently incorrectly named; is that right, sir?

A. I don't remember that. It might possibly have been that there might have been another, but I can't recall.

Q. In any event, did you inform Mr. Mandel or Mr. Sourwine, whichever the case might be, what it was that you learned from the personnel people at the Times with reference to the Shelton subpoena?

A. Yes, I did.

Mr. Hitz: That is all.

Redirect examination.

By Mr. Rauh:

Q. I believe you said, in answer to a question from Mr. [fol. 181] Hitz, that the New York Times man might have said that this was likely the one you want; is that correct?

A. I say yes, he might have said that.

Q. He might have said that.

At the time, he was referring to several Sheltons on the Times, was he not?

A. He was trying to help me get the subpoena to the right person. Now I had the impression that there was a Mr. Shelton in the New York Times because the subpoena was dated there, and if there was that person, I wanted to be sure to get it to the right person. I didn't want to give it to a person that wasn't on there.

Q. Did you understand him to mean by the words, "likely the one you want," that this is the one who is in the news department, not the janitor, not the linotype operator?

A. Quite frankly, Mr. Rauh, the person that I talked to seemed to be fairly familiar with most of the names. It didn't seem to come as any great surprise to him.

Q. I didn't follow that. What did you say?

A. As I recall, this personnel head seemed fairly familiar with the list that I had. It didn't come as any great surprise to him.

Q. No, that isn't quite what I was asking. Did you understand his statement that "it is likely the one you want" to refer to the fact that there were several Sheltons and [fol. 182] this was the one in the news room, not the janitor, not the linotype operator, or did you understand it some other way?

A. My understanding was that the person whom I gave the subpoena was the one to whom the New York Times officer referred as most likely the one I wanted for the subpoena. I am not sure I am getting you.

Q. Did they give any reason why he was the most likely one? Was the reason that he was in the news side, not the linotype operator, the reason?

A. I don't recall that that was the reason.

Q. You don't recall what the reason was?

A. I have a very vague recollection that there was something said about the FBI having been there to look into some of these things and that there might have been some reference, as I recall, to this Mr. Shelton in connection with that.

Q. Did they say the FBI had been there looking at a number of people on your list?

A. I received that impression from him, as I recall. What his exact words were, I couldn't tell you.

Q. That the FBI had been there on a number of the same people you were there to subpoena; is that the point you are making?

A. I don't remember exactly what he said. I know that the questions—they mentioned the FBI as having been [fol. 183] there, and as I recall, it may have been that in

connection with that they said this Mr. Shelton was perhaps likely the one I was looking for.

Q. Did he tell you the FBI had been there to see Mr. Shelton?

A. I don't recall whether he exactly said they had been there to see him or not. It runs in my mind he might have.

Q. You can't remember whether he said that or didn't say it?

A. I mean, you are trying to pin me down to something that I am not completely clear in my recollection. There is a strong possibility, that is the best I can give you.

Q. Mr. Halleck, this isn't so long ago. This is just a year or so ago. Your committee asked questions going back ten and twenty years. Now I am just asking you, did he or didn't he say the FBI had been in to see Mr. Shelton?

A. I don't recall.

Mr. Rauh: Thank you.

Mr. Hitz: No further questions.

The Court: You may stand aside.

Thank you, Mr. Halleck, and you may be excused.

You have no further use for him?

Mr. Rauh: No, sir.

Thank you, Mr. Halleck.

[fol. 184] The Court: Recall Mr. Sourwine.

Thereupon JULIAN G. SOURWINE resumed the witness stand, and having previously been duly sworn, was examined and testified further as follows:

The Court: You may proceed with your cross examination.

Cross examination (resumed).

By Mr. Rauh:

Q. I show you Government Exhibit No. 3 and ask you what that is?

A. This is a certification by Joseph A. Davis, chief clerk of the Senate Committee on the Judiciary, with respect to

a resolution adopted on January 20, 1955 by that committee.

Q. Are you familiar with the practice of the Judiciary Committee in that regard?

A. In regard to certifying minutes, sir?

Q. Yes.

A. Yes, sir. The chief clerk does it.

Q. Does this mean that this is a part of the minutes of the Judiciary Committee of that day? I mean, this is taken out of the minutes for that day?

A. I would take it to mean that, yes, sir.

Q. Now, are these minutes secret or confidential in any way?

[fol. 185] A. The minutes of the Judiciary Committee are the confidential property of the committee, yes, sir, and usually so regarded.

Q. Your understanding is that this is an extract from the minutes of the Judiciary Committee? It doesn't say that.

A. No. This is a certification of the text of a resolution which was adopted on that day. I would have no question that Mr. Davis got the text of the resolution from the minutes. It would be there if it was adopted.

Mr. Rauh: If Your Honor please, you will recall that I was looking at this at the time that I said no objection rather quickly. It seems to me that we ought to have the original as the best evidence. I thought this was the minutes, but I misread it. This is apparently an extract from the minutes, although it doesn't even say it is an extract from the minutes. It says that "the following resolution was adopted."

Now, from all we know, this resolution was never at that time put to writing, and I think we should have the best evidence of this. I read too quickly, I think, at that time. I was trying to expedite things, too. But I really feel we should have the minutes or at least a certification that this is an extract of those minutes. It has no significance as a resolution adopted if it wasn't in some way put [fol. 186] into some formal document of the committee. I would have objected at the time, but I didn't.

The Court: If you had made a timely objection, Mr. Rauh, to the admission of that exhibit because it wasn't the original or a properly certified copy, exemplified copy, the Court would, of course, have sustained it. Are you questioning now that it is a correct copy of the minutes?

Mr. Rauh: Yes, because it doesn't even purport to say that it is from the minutes. It was only from Mr. Sourwine that I elicited the information that it might be from the minutes.

The Court: That is right, and he testified that it was.

Mr. Rauh: He didn't testify that this was from the minutes. He testified that the practice was to take it from the minutes.

Now if Mr. Davis had certified that the following resolution was adopted on motion of Senator Eastland and appears in the minutes of that day, I think the certification would have been all right and I wouldn't have made an objection even now. But what I am concerned with is that something was admitted, in my hurry to be cooperative, that is not an extract from the minutes. If Mr. Hitz can assure us that this is an extract from the minutes, why, I would be inclined to take his personal assurance.

[fol. 187] Mr. Hitz: I can't do that, but I can say this, that there has been a stipulation entered into, it is true it is an oral one, with Mr. Silard of Mr. Rauh's staff, to the effect there would be no objection to documents of this sort based on the authenticity of the particular document. That is the reason we do not go further in having this certified. If Mr. Rauh doesn't care to go forward with that stipulation, there may be other documents that I will not go forward with on my side of it, too.

Mr. Rauh: I am not in any way going back on any stipulation, Mr. Hitz. I am not suggesting that if this document had contained the statement that it was taken from the minutes we would in any way object to it.

The Court: Let me ask, counsel, did each of you exchange copies at the time that you proposed to bring?

Mr. Hitz: We did not, Your Honor.

The Court: But you did have a stipulation.

Mr. Hitz: We did have a stipulation and an understanding both orally, yes, Your Honor.

Mr. Rauh: If this had said that this was an extract from the minutes, I wouldn't think of questioning it. Indeed, if he will say that, I wouldn't question it.

Mr. Hitz: I can't say it. May I see the document, though?

Mr. Rauh: We are not suggesting that this document [fol. 188] isn't authentic from the clerk. We are saying that this document on its face does not state that it is an extract from the minutes of that date, and I am simply suggesting that we clarify that point. I think at the time this was admitted, sir, I said I was surprised, and I didn't take long enough to examine it.

Mr. Hitz: Well, perhaps we can clear it up in this fashion:

Were you present, Mr. Sourwine, at any time on January 20, 1955 when any resolution was made and passed by the Judiciary Committee having to do with the continued existence of the subcommittee?

The Witness: No, sir, I was not.

Mr. Rauh: Might I make the suggestion that overnight Mr. Hitz ascertain whether these are from the minutes, and if he says they are from the minutes, that will be fine by me?

The Court: Yes, I am sure there is nothing confidential about finding out whether it is an excerpt or not.

Mr. Hitz: I don't see that problem. I wonder if we can take it step by step. First off, does Mr. Rauh seek to change his position and now object to the document's admission in evidence, whereas he did not before? I think that is No. 1 step to be taken.

The Court: Yes, the objection comes pretty late, I agree [fol. 189] with you, counsel, but, of course, the Court wants to be absolutely fair. The Court assumes, of course, that this is a copy, an exact copy, whether it has got the proper certificate on it or not. What is the purpose? Is there some question in your mind as to whether this—

Mr. Rauh: This may simply be an oral resolution subsequently reduced to writing and never part of the minutes or an official part of the committee operations, sir. If it only had said on it that it was a part of the minutes, why, no one would question its authenticity or anything else about it. After all, the authority of the subcommittee is a major question at issue.

The Court: Well, Mr. Sourwine, apparently you are going to have to come back in the morning. It looks like we are not going to be able to finish today. Will you be able to check into that and tell us in the morning? You will take Mr. Sourwine's word for it, wouldn't you?

Mr. Rauh: Yes, sir.

The Witness: Yes, sir, I can check it.

The Court: That is what we will do.

By Mr. Rauh:

Q. Mr. Sourwine, is there any published statement of the authority of the subcommittee?

A. You mean the Internal Security Subcommittee?

Q. Yes, sir.

[fol. 190] A. Yes, sir. The document that you asked me about, S. 366, has been published in a good many forms as an original Senate resolution and in some of our reports and in many of our hearings.

Q. Is there any published document, Mr. Sourwine, giving the Senate Internal Security Subcommittee the authority in S. 366?

A. I am sorry, I don't understand you.

Mr. Rauh: Will the reporter repeat the question?

(Question read.)

The Witness: Oh, you mean is there a published document which shows that the authority conveyed by S. 366, by the full committee, has been passed on to the subcommittee?

By Mr. Rauh:

Q. Precisely.

A. Yes, I think there are such documents. I think that the committee calendars for successive years since 1950 would show the composition of the Special Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws—is such evidence.

Q. By calendar, are you referring to this document?

A. No, sir, I am not. This document is a page from the calendar, however.

Q. But you say there is something in the calendar other than that?

[fol. 191] A. Yes, sir. The table of contents, which is on the other side of what you showed me, shows a list of committee members, legislative calendar, legislation pending in standing subcommittees, legislation pending in session subcommittees. The Internal Security Subcommittee, so-called, or to use its technical name, the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Laws, is a standing subcommittee, and as such it is listed inside the front cover—not inside the front cover, about Page 3, I think, of the calendar. It is also listed in the back of the calendar, where there is a separate listing of bills and legislation which is referred to and is pending before that committee at the time the calendar is printed, but every issue of the calendar shows the membership of the subcommittee at the time that issue is printed.

Q. And does it show the authority of the subcommittee?

A. In terms, no, sir. You asked me if there was any printed document that showed the conveyance of the authority to the subcommittee.

Q. And I repeat the question: How does this show the conveyance of the authority from the Judiciary Committee to the subcommittee simply by listing the members?

A. Well, I think it is a reasonable conclusion, Mr. Rauh, that if the Judiciary Committee has authority as a whole committee or as a subcommittee thereof to pursue an in-

[fol. 192] vestigation of the Internal Security Act and other internal security laws, and if its calendar shows that there is a standing subcommittee with that name and lists the members thereof, that that standing subcommittee is authorized by the full committee to go forward. Certainly every member of the committee has knowledge of that calendar.

Q. You are relying on the name of the subcommittee?

A. No, I am not relying on it at all. I answered your question as to whether there was a printed document which showed there had been a printed delegation, and I told you in my opinion the calendar is such a document. Then

you asked me in substance if there was a printed document which showed the actual conveyance of the authority, and to the best of my knowledge, there is not.

Q. There is no document that shows the conveyance?

A. I do not know of a document which in terms sets forth the action of the Judiciary Committee in conveying this authority to the Internal Security Subcommittee.

Q. How would the defendant, then, know what the authority of the committee was?

A. By defendant, you mean defendant where, here?

Q. Defendant, after he had refused to answer the questions.

A. There are no defendants before the committee, sir. The committee is not a court.

[fol. 193] Q. All right, how would a witness know the authority?

A. Well, many times witnesses have asked for the committee's authority, and I have on such occasions furnished them with a copy of S. Res. 366, and it has seemed to satisfy them.

Q. But other than such delegation as may appear in the calendar, you know of none?

A. I didn't say that.

Q. Will you state it any way you please?

A. Mr. Rauh, you ask me questions. Don't ask me to state something the way I please. I have stated it the way I pleased. Now you have twisted the words. You are attempting to get me to say something that is slightly inaccurate, and I don't desire to do it if I can avoid it.

Q. Will you please list all the public delegations of authority from the Judiciary to the subcommittee?

A. All the public delegations of authority?

Q. From the Senate Judiciary Committee to the Internal—

A. By that, you mean printed documents?

Q. Yes, anything that is published.

A. I don't know of any such printed documents.

Q. Do you know of any public documents whatever, other than the calendar, that shows any delegation of authority from the Senate Judiciary Committee to the Internal Se-

[fol. 194] curity Subcommittee?

A. Which shows it?

Q. Yes, shows it in any way.

A. Yes, I think the fact that the Judiciary Committee has reported to the Senate on numerous occasions the reports of its Subcommittee on Internal Security certainly shows its ratification of the acts of that subcommittee. But, again, that does not contain a specific statement in terms of the delegation, if that is what you are trying to get at.

Q. And as far as there is, you know of none?

A. As far as that goes, I know of no public printed document that contains in terms the actual delegation of authority.

Q. May we take the word "printed" out of that answer? You know of no public document that makes the delegation—

A. Then you get into a hassle of whether the minutes of the committee are a public document, and I don't know what is in your mind on that point.

Q. Didn't you just testify they were confidential?

A. I testified that I considered them confidential, sir. They are the official minutes of an official body which is a part of one of the branches of the Government of the United States.

Q. Do you know of any non-printed public document [fol. 195] containing a delegation of authority from the Judiciary Committee to—

The Court: Oh, I think we are going a little too far, counsel, now. I want to be just as generous as I can be, but the witness has answered you about half a dozen different ways, and we don't propose to have any filibuster here in this court. That is confined to the United States Senate.

By Mr. Rauh:

Q. What was the question under inquiry before the subcommittee when the defendant testified?

A. You mean the specific questions I asked him?

Q. No. I refer you to 2 U.S.C. 192, the contempt statute, which says that it shall be contempt for refusing to answer

any question pertinent to the question under inquiry. I ask you, what was the question under inquiry when the defendant testified?

A. Well, there are two ways to answer that. Broadly, the question under inquiry was the scope and extent and activities of the communist conspiracy against the United States, more specifically, as it applied to the New York area, and on the particular day he testified, and with regard to his testimony, still more specifically within that broader area, and we endeavored to get information about communist activity in the New York Times or in connection with employees of the New York Times or by such employees.

[fol. 196] Q. So there are three gradations.

A. You can make as many gradations as you want. I am attempting to answer your question.

The committee, every time it sits, Mr. Rauh, sits with its full authority. That authority is fixed by the Senate of the United States, and neither the full committee nor the subcommittee can change it. I am trying to be responsive to your question.

When the committee was questioning this particular witness, within the area of its much broader investigation, it was concerned with the particular area of that broader investigation which concerned communist activity among newspaper people, communist activity on the New York Times and communist activity in an effort to infiltrate the Typographical Union in New York.

Mr. Rauh: May I ask that that be marked as Defendant's Exhibit for identification No. 2?

(Defendant's Exhibit 2 was marked for identification.)

By Mr. Rauh:

Q. I show you Defendant's Exhibit for identification No. 2 and ask you what that is?

A. This is a mimeographed sheet entitled "Resolutions and Rules Adopted by the Internal Security Subcommittee [fol. 197] of the Committee on the Judiciary of the United States Senate at its Meeting February 7, 1955." It appears to be one of the copies which the committee had mimeographed of those rules.

Mr. Rauh: We offer it in evidence.
Mr. Hitz: No objection.

(Defendant's Exhibit 2 for identification was received in evidence.)

By Mr. Rauh:

Q. Would you read, Mr. Sourwine, please, the first sentence of No. 1?

A. (Quoting):

"No major investigation shall be initiated without approval of a majority of the subcommittee."

Q. Was there such an approval prior to the time that this investigation that you have referred to was undertaken?

A. Oh, yes, sir, in the sense that the investigation into the scope of communist activity was undertaken almost at the outset of the committee's work, and some several years before the adoption of this particular rule here. If you are asking me whether there was in terms a committee approval, a subcommittee resolution approving the inauguration of the hearings in New York, I shall have to state there was not. But let me call your attention to the fact that [fol. 198] this is not the initiation of a major investigation and that a majority of the subcommittee were present at the hearings which were held in Washington at which Mr. Shelton testified.

Q. You didn't consider this investigation at which Mr. Shelton testified a major one?

A. I did not consider it was initiated subsequent to the passage of this rule.

Q. That rule wasn't in effect until that date?

A. Until February 7, 1955.

Q. When was this investigation at which Mr. Shelton testified initiated?

A. I think the committee began its investigation into the scope of Soviet activity, communist activity, in the United States in late 1950 or certainly by early 1951.

Q. Is it your contention that the committee just had one major investigation, communism, and they don't need authority for any other?

A. I think the committee has one source of its power and authority, and that is S. Res. 366. I think the committee sits with that full power and authority every time it sits. I was present when these rules were adopted. I know what the committee had in mind. I know the reason for this rule. This rule was not violated in the case of the hearings which were held in New York in executive session and subsequently in Washington.

[fol. 199] Q. Will you please state the reason for the rule?

A. Yes. There was some concern, not in our committee, but in the Senate, because of activities of some other committees, over the possibility that some committee might hold a "rump" session without notice to all of the members, that there might be an important hearing that all of the members would not have notice of. It was not only to avoid that possibility, but to show that our committee had taken an affirmative position against having anything like that happen, that this rule was adopted.

Q. Now, what investigations have been considered major enough by the committee to require approval?

A. I don't recall any instance in which a separate approval for an investigation has been undertaken since this resolution was passed. Every member of the full committee has full notice of every hearing far enough in advance to be there, and there have been no complaints from any member of the subcommittee about any violation of this rule.

Q. Has any major investigation been initiated since this rule was adopted?

The Court: Counsel, what is the purpose of this line of cross examination now?

Mr. Rauh: I think they violated their own rule, sir. I think this was a major investigation and there was no approval. The witness has already testified there has been [fol. 200] no approval of it, and I think it was a major investigation. I think they violated their own rules. Whether that vitiates the decision, I am not sure. I was going to argue that.

The Court: I would doubt that.

Mr. Rauh: But I think it is clear that they have violated their own rules, and that is what I am getting at, sir.

The Witness: Do you still want an answer to your question, Mr. Rauh?

By Mr. Rauh:

Q. Yes, I do.

A. I am not sure. I don't think so, in the sense that it would involve any violation of this. However, there was a period during which I was not with the committee, a period of some eight months; I was not privvy to the committee's discussions, and I can't testify as to what the committee may have regarded at that time as anything in the nature of a major investigation being inaugurated during that time.

Q. To your knowledge, there has never been an approval under this section?

A. I do not know of one, no, sir. That section has been complied with in spirit by the full advanced public notice to every member of the committee with regard to all the public hearings that are being held.

The Court: Do you have many more questions?

[fol. 201] Mr. Rauh: I have a great number on wholly another subject.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: At this time, the Court will take a recess until 9:30 in the morning.

You indicated, Mr. Rauh, that you had a number of authorities to substantiate your position that you are entitled to have that letter subpoenaed down here. I would like to take the names of those cases in order to take a look at them.

Mr. Rauh: What I was addressing myself to was that the mere confidentiality of the material would not withhold it. I have those here.

Mr. Hitz: Your Honor, I can save some time. We concede that.

The Court: Also, on the question of materiality.

Mr. Rauh: At the moment, I was addressing myself, when I said I had the cases handy, to the proposition that confidentiality didn't affect it.

Mr. Hitz: We concede that proposition, Your Honor, that if matter is material to the defense, that the confidential character imposed upon it by the Government is not a reason for its not being produced.

The Court: I understand that clearly, but what I am trying to get at is some authority he may have showing that. Suppose they had a letter up there that is material [fol. 202] to this inquiry.

Mr. Rauh: Well, sir, I was not referring to those. I would like to produce those at 9:30. I don't have those at the moment.

The Court: If you can give me the authorities, I will take a look at them this evening myself.

Mr. Rauh: The general principle that I was going on in asking for that letter is we made a prima facie case. It is a sheer matter of credibility. I do say here in all sincerity that I think we have made a prima facie case that there is no letter saying what Mr. Sourwine says are the contents of that letter. Now I am not saying that there isn't a letter referring to a Shelton. It might even refer to Willard Shelton, for all I know. But I am saying there is no letter and that we have shown that, because if they had a letter like that, they wouldn't have issued a subpoena to a well known, definite and specific Washington newspaperman, and if they had a letter like that, Mr. Sourwine would never have cross examined the defendant the way he did, and I want this letter to show that there wasn't probable cause to go after the defendant. I don't believe this letter exists in the terms in which Mr. Sourwine has stated. He admitted—he stated it from memory—he said he hadn't seen it for over a year. This is a sheer case of credibility.

The Court: Well, I will take a look at it. He will take a [fol. 203] look at it.

(Whereupon, at 5:10 p. m., a recess was taken until 9:30 a. m., Tuesday, January 15, 1957.)

[fol. 203a] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 203b] [File endorsement omitted]

[fol. 204]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

No. 1215-56

Washington, D. C.

Transcript of Proceedings—Tuesday, January 15, 1957

The above-entitled cause came on for further trial before the Honorable Ross Rizley, a District Court Judge, at 9:30 a. m.

[fol. 206]

Proceedings

Thereupon JULIAN G. SOURWINE resumed the witness stand, and having previously been duly sworn, was examined and testified further as follows:

The Court: Are you ready to proceed, Mr. Rauh, with the cross examination?

Mr. Rauh: Yes, sir.

I might mention that I left in your office a short while ago a memorandum concerning the production of the document pertaining to the authorities at the close of the day.

The Court: I had it.

Mr. Rauh: Thank you, sir.

Cross examination (resumed).

By Mr. Rauh:

Q. I believe yesterday, Mr. Sourwine, you were requested to find out whether the language in Government's Exhibit 3, after "resolve," appears in any minutes of the Judiciary Committee.

A. Yes, sir. It does appear in the minutes. I have satisfied myself that it does.

Q. You have seen the minutes?

A. No, sir, I have not.

Q. You have not seen the minutes?

[fol. 207] A. That is correct. I made the best effort I could. I telephoned the clerk of the committee as soon as court adjourned last night. I talked with him over the telephone. I caught him just as he was leaving to catch his train for Silver Spring. He said he had the minutes before him, that it did appear in the minutes, that he remembered the certification.

I went down there this morning, Your Honor. I was there at 8:30. I waited for him to come in. I didn't leave there until time to come to court. I left there 17 minutes past 9:00. He had not come in this morning. So I have not myself examined the minutes, I am sorry. I am sure Mr. Davis is available if the Court wishes to call him.

The Court: You did receive the information from one of your associates?

The Witness: I received it from the clerk of the Committee on the Judiciary of the Senate, sir, Mr. Joseph Davis, whose signature appears on this certificate.

By Mr. Rauh:

Q. What date did he say the minutes which he had before him carried on the face?

A. January 20th, sir.

Q. Mr. Sourwine, how many persons were called in executive session in New York City in December of 1955?

A. I am sorry, sir, I don't recall the precise number. [fol. 208] I think it was in the neighborhood of forty persons.

Q. How many of these forty were employees or past employees of the New York Times?

A. Certainly a majority of them. Again, I don't remember the precise number.

Q. Is this the document I showed you yesterday, Mr. Sourwine, which you described as a profile of yourself?

A. I believe it is the same document. I said I think the New York Times calls these sort of things profiles.

Q. Does this statement from this profile by Mr. Reston refresh your recollection, that "thirty witnesses from the Times out of thirty-eight for the whole press, radio, tele-

vision and other communication media have led to the charge, not only by the Times, but by other publications, that the Times is being singled out for attack?"

Does that refresh your recollection that there were thirty-eight witnesses and that thirty of them were from the Times?

A. No, sir, it does not.

Q. How many would you say were from the Times?

A. I can't be any more accurate than I have, sir. It may very well have been thirty out of thirty-eight, but I don't remember the precise figure.

Q. Do you have any reason to believe that this is not a correct statement?

[fol. 209] A. Not in the sense that I wish to challenge Mr. Reston, but I remember at the time having seen a number of newspaper stories which gave differing totals as to the number of witnesses and as to the number that were from the New York Times.

Q. I show you a clipping from the Review of the Week of the New York Times after the open hearings. Is that what this appears to be?

A. There is no heading on this, sir, but I will certainly accept your statement that it is from the New York Times. There is no mast head.

Q. Now, does this refresh your recollection—

Mr. Hitz: Excuse me, I would like to object, even though the question hasn't been completed. I think it is objectionable so far as it has gone, and this is my objection. The question is: does this refresh his recollection? The only way he can refresh his recollection, as I understand it, from a document of this sort would be if he had previously read the document; otherwise, it is cross examination based upon somebody else's statement on a subject that this witness has testified about.

The Court: I think your interpretation of the rule is correct, Mr. Hitz.

By Mr. Rauh:

Q. Have you read this statement?

[fol. 210] A. No, sir.

Q. Had you read the profile of yourself in the New York Times?

A. Yes, sir, I have.

Q. And do you remember the statement about the thirty witnesses out of the thirty-eight being from the Times? Do you remember this at that time?

A. I did not remember it until you asked me about it.

Q. Now do you remember that this appeared?

A. No, sir, I don't, but I accept your statement that it does.

Q. Would it be possible, Mr. Sourwine, for you to check your records and determine whether the statement is correct, that thirty out of thirty-eight witnesses called before executive session were past or present employees of the New York Times?

A. Yes, I believe it would be possible to check.

Mr. Rauh: I would like to request that that check be made.

The Court: What would be the materiality of it finally, anyhow, counsel?

Mr. Rauh: The materiality is this, if Your Honor please. The Government has put in proof, or what they believe to be proof, of a legislative purpose in the investigation of [fol. 211] what I believe was an investigation of the New York Times. It is our contention, and this rebuts the proof of a legislative purpose, that this was not an intent to get information for legislation, but was a reprisal against the New York Times, and the only way I can prove it is a reprisal against the New York Times is by proving how many of the employees were from the New York Times and how many were from other papers, and from other things that happened which I will come to, but it seems to me that we must be able to be allowed to disprove the legislative purpose by proving the other purpose.

Mr. Hitz: We object, because it is not material. It may so happen that there were more communists that came to the attention of the committee that worked for the New York Times than any other paper. That might be partly because it is a large paper. It might have another reason, too. But even so, Mr. Sourwine, on the present state of

this testimony, has stated that for all he knows, it may well have been thirty out of thirty-eight. So that there is no conflict between what Mr. Rauh seeks to prove and what is the positive testimony of this witness, because he is not positive on the precise number. So that the evidence, really, is in, so far as the witness goes.

The Court: I think so. The Court will take into consideration in determining this case finally Mr. Sourwine's [fol. 212] testimony. He says it may well have been thirty.

Mr. Rauh: Would the Government make the concession that there were thirty out of thirty-eight from the New York Times?

Mr. Hitz: No, I am unable to do that. I am not unwilling to. I am unable to.

The Court: Let's get along, counsel. I am going to sustain the objection.

By Mr. Rauh:

Q. How many persons were called in open session January 4, 5 and 6, 1956?

A. Eighteen, sir.

Q. And how many of these were past or present members of the New York Times?

A. I would have to refresh myself by examining the testimony of each witness. Do you wish to have me do that?

Q. I do, but I have prepared a chart which I will show you and ask you if that helps you with this?

A. This whole thing is in evidence, isn't it, Mr. Rauh?

Mr. Hitz: It is, Mr. Sourwine.

By Mr. Rauh:

Q. Does this in any way help you to answer the question: How many of the eighteen were past or present employees of the New York Times?

[fol. 213] A. Yes, it does.

Let me read it further.

Yes, sir, it refreshes my recollection, and I would say that what you have here is probably substantially correct.

It shows 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11—it shows eleven of those as present Times affiliation; that is, in the column which you have headed "Times Affiliation," you have the word "present" eleven times and "former" three times. I think there may be a technical error in one of those names. I think one of the persons you marked "present" may have testified that he had just terminated his employment.

Q. I think that is correct.

A. I think he indicated that he felt it was as a result of being called in this hearing or the consultation he had with his employer as a result he had of being called.

Q. I think that is correct, and we included him as "present" because he had been present at the time of the initiation of the investigation.

So that it is a fact, then, that fourteen out of eighteen of the persons called in the investigation publicly were present or past employees of the New York Times?

A. Yes, I think that is true.

Q. And isn't it a fact that a fifteenth was a brother of an employee of the New York Times?

A. Yes, sir. You are referring to Mr. Fine, the exhib-
[fol. 214] itor of Artkino pictures.

Q. That is correct, sir.

Mr. Sourwine, would you agree with me on one thing, that the New York Times is an anti-communist newspaper?

A. Yes, sir, I believe that to be true.

Q. Can you point to a single story, article or editorial that has been printed in the Times that you or the committee considered pro-communist at the time you called these men?

Mr. Hitz: I object: irrelevant and immaterial.

The Court: Objection sustained.

By Mr. Rauh:

Q. Did you or the committee have a single pro-communist piece from the Times before you when you called these witnesses?

Mr. Hitz: Objection: immaterial and irrelevant.

The Court: The objection will be sustained. The witness has testified they weren't investigating the Times.

He said he agreed with you that the Times was an anti-communist paper, and I don't think it is material. The objection will be sustained.

Mr. Rauh: May I be heard on this point, sir?

The Court: Beg pardon?

Mr. Rauh: May I be heard on this point?

The Court: Well, I will hear you briefly, yes.

[fol. 215] Mr. Rauh: Yesterday the witness, in stating several of the questions under inquiry, indicated that one of the questions was communists on the New York Times. We want to show that this was a reprisal against the New York Times. How else can we show it? I am sorry, I don't mean to put it in a question. I will put it as a statement. You are preventing us from the only way we have of showing that there was no legislative purpose, but in fact, on the contrary, a purpose of reprisal against the Times, and it was for that I made it. Of course, Your Honor's ruling is final under the circumstances.

The Court: You have your statement in the record and the ruling stands.

By Mr. Rauh:

Q. Did the committee or any staff member ever talk to the publisher of the Times about this problem of communist infiltration of the Times?

Mr. Hitz: I object.

The Court: I think it is immaterial. The objection is sustained.

By Mr. Rauh:

Q. Did the committee or any staff member ever examine the writings of the publisher or other executives of the Times to determine how they were dealing with this problem?

Mr. Hitz: I object.

[fol. 216] The Court: The objection will be sustained.

Mr. Rauh: Would you mark this for identification, please?

(Defendant's Exhibit 3 was marked for identification.)

By Mr. Rauh:

Q. I show you Defendant's Exhibit 3 for identification and ask you what that is?

A. This is the New York Times, Magazine Section 6, for February 15, 1953, which you have opened to Page 12.

Q. What is on that page?

A. At the top of the page is a three-column head: "Have We The Courage To Be Free?" subhead: "A plea that we not allow fear of totalitarianism from the left or from the right to stifle our freedom of expression." Immediately under that is a paragraph set in italics as the theme of its bicentennial celebration plan for next year: "Columbia University has chosen 'Man's Right to Knowledge and the Free Use Thereof'."

> "The article on this page is adapted from a recent speech on this theme by Arthur Hays Sulzburger, publisher of the New York Times; was delivered before the Columbia College Alumni Association."

Then comes the by-line by Arthur Hays Sulzburger.

[fol. 217] Q. Who is Mr. Sulzburger?

A. Mr. Sulzburger is the publisher of the New York Times.

Offers in Evidence and Objection Thereto

Mr. Rauh: We offer the article in evidence.

Mr. Hitz: We object to it. It is irrelevant, immaterial, and it is remote in time.

The Court: The objection will be sustained.

Mr. Rauh: I would like to make an offer of proof of the contents of this.

The Court: Very well, the record will show that you have offered the exhibit. The objection of the Government is sustained as immaterial and irrelevant.

By Mr. Rauh:

Q. The defendant testified, did he not, in a closed session on December 7, 1955?

A. Yes, sir.

Q. Did you obtain any further information about the defendant after that appearance and prior to calling him in open session?

A. I think we probably did obtain some, but nothing of any importance.

Q. Wasn't the committee's reason for repeating the interrogation in public session simply to embarrass the Times?

A. No, sir. The reason for calling Mr.—the executive session was because in the public session he had made it [fol. 218] clear that he had information which would be useful to the committee and the committee hoped that on the recall he would give us that information.

Q. And who was it that you testified yesterday had changed his mind between an executive session and a public session and gave you the testimony you were looking for?

A. I think the name that was mentioned yesterday was Dr. Bella Dodd. She is a woman.

Q. Isn't it a fact that when Dr. Bella Dodd testified, that she had had a change in status, namely, from being a communist to resigning from the party?

A. That is correct.

Q. So that that wouldn't be any evidence, would it, that Mr. Shelton, the defendant, was going to give you testimony he wouldn't give you in executive session?

A. I don't know whether he resigned from the party, sir, in the interim, and besides that, you asked me about Mrs. Dodd. You started out by asking who the witness was that was named yesterday. Now if you want to ask me whether there are other cases of witnesses who have changed their testimony, I will answer yes, there are.

Q. Who are they?

A. One of them is Harvey Matusow, who gave us on subsequent days testimony that he had refused on the day before. That comes to mind immediately, because there were [fol. 219] a number of such instances in Matusow's testimony. I will testify that there have been others, and I don't at the moment recall the names of them.

Q. You can't name another person who changed his testimony publicly over what it was in executive session?

A. At the moment, I cannot.

Q. Isn't it a fact that the Senate Internal Security Committee has indicated that Mr. Harvey Matusow was an exceptional case?

A. Oh, he was, yes, sir, in many respects, but not in this respect.

Q. May I ask why it was different in this respect than in others?

A. Well, sir, "this respect," when I use that term, means to me what I took it to mean to you, the fact that he had changed his testimony on a subsequent hearing. That is not unusual, because a number of other witnesses have done it. I can think of another witness who did it. Mary Knowles did it. She appeared before us three times. Her testimony was different each time.

Q. Now, hadn't the committee examined all these fourteen, plus the brother, in executive session?

A. Yes, sir.

Q. How did you decide which witnesses from the executive session should be called in the open session?

[fol. 220] A. That decision was made on the basis of what we thought would give the committee evidence or might give the committee evidence that would be useful in its investigation.

Q. Who made the decision?

A. I made the recommendation with regard to which witnesses should be called and which should be dropped.

Q. And who made the decision, if you made the recommendation?

A. The decision was made by the chairman, sir, in approving my recommendation.

Q. He had not been at the executive session, though, had he?

A. No, sir, he had not.

Q. So, in effect, he approved all your recommendations?

A. I would like to have an instruction, Your Honor. There was one recommendation I made which the chairman did not approve. I would consider it the confidential business of the subcommittee.

The Court: I don't think that would make any difference, if he made one he didn't approve. I don't think that is material to this case.

Mr. Rauh: I don't want the name, if Your Honor please. I don't want to hurt someone unnecessarily, so I am not [fol. 221] asking the name of someone.

By Mr. Rauh:

Q. What I would like to ask is, is this a person you wanted to call that the chairman didn't want called?

A. No, it is the other way around. It is a witness who was in executive session, and I advised that the witness not be called in public session. The chairman felt that his testimony was of importance and that he should be called.

Q. Isn't it a fact that in executive session you had largely people who wouldn't have reflected on the Times other than those you called?

A. Would you rephrase the question, sir? I have a little trouble.

Q. Isn't it a fact that the people you had in executive session which you did not call in public session would not have reflected on the New York Times had they been called?

A. Yes, sir, I think that is a fair statement. There are also people who in the opinion of the committee did not have information of value to the committee's investigation.

Q. Isn't it a fact that you had another case of mistaken identity in front of the executive session?

A. Will you refresh my recollection, Mr. Rauh?

Q. Yes. Isn't it a fact that John Briggs told you in executive session that he was a card-carrying Republican? [fol. 222] A. I don't see that is a case of mistaken identity, sir.

Q. Would you ordinarily call in front of the Senate Internal Security people who have been card-carrying Republicans as distinguishes from someone mixed up in the communist movement?

A. Mr. Rauh, the Republican Party and the Democratic Party and all other bona fide political parties have no immunity from communist infiltration. We have called before the committee communists who were Republicans, communists who were Democrats and communists who did not profess either of those political beliefs.

Q. Isn't it a fact there wasn't one piece of evidence that Mr. Briggs had been mixed up in any way, shape or form with anything communist?

A. No, sir.

Mr. Hitz: I object. Excuse me. Give me an opportunity to object from here on. It is irrelevant and immaterial.

The Court: The objection is sustained.

By Mr. Rauh:

Q. Did the committee call the past and present New York Times employees before it in these executive and open sessions because it believed there was a high percentage of ex-communists on the Times?

[fol. 223] A. No, sir.

Q. It did not believe there was a high percentage?

A. That is not what I said, Mr. Rauh, and you know it.

Q. I will repeat the question. Did the committee call the past and present New York Times employees before it in these executive and open sessions because it believed there was a high percentage of ex-communists on the Times?

A. No. The committee called these people before it because it had information that the persons whom it called were in a position to give the committee information about the matters it was investigating.

Q. How many present employees of the Times were shown to have been connected at any time in the past with the communist movement?

A. I have never made such a tabulation, sir.

Q. I would be glad to let you have this chart again in order that you can make that tabulation.

A. I can't make that tabulation from this chart, sir.

Q. I hand you Government Exhibit 7 and ask if that will help you make the statement?

A. No, sir, it will not. If you want to limit your question to the testimony of the witnesses that are in this document which is in evidence here, and if you want me to [fol. 224] go through it to find out how many of those witnesses testified to communist connections, I will be glad to do it for you.

The Court: Just a moment.

Some of you gentlemen in the room who are attorneys or parties in the case of Katz v. Kaiser Motors: we had expected to start trial of that case this morning, but from the looks of things, I imagine, gentlemen, that we might just as well excuse you until the morning, because I can't tell at this time whether we will reach your case. It is the next case on call, but I doubt seriously whether it would be reached today. There is nothing we can do about that.

(Question read by reporter as follows:

"Question: How many present employees of the Times were shown to have been connected at any time in the past with the communist movement?")

By Mr. Rauh:

Q. Can you answer the question the reporter has read?
A. No, sir.

Mr. Hitz: I object to the question. It is irrelevant and immaterial. I withdraw my objection, since he has already answered it.

The Court: The objection will be sustained.

By Mr. Rauh:

[fol. 225] Q. Did your committee make an investigation of communists on any other morning newspaper in New York?

A. The committee has not made an investigation of communists on any morning newspaper in New York as such, sir.

Q. What was the committee doing, if I might ask, when it called thirty out of thirty-eight in executive session and fourteen plus a brother out of eighteen in public session?

A. The committee was attempting to get information from persons whom it had reason to believe had information about communist activity in New York City and, more specifically, about communist activity and infiltration of mass communications in New York City.

Q. And did the committee make a similar effort with respect to any other morning newspaper in the New York area?

A. Mr. Rauh, this effort was not made with respect to any morning newspaper. If you mean by your question to inquire whether a like number of employees of other morning newspapers in New York were called in this particular series of hearings, the answer is no.

Q. Did the committee make any effort to find the ex-communists or communists on the other morning newspapers in New York City?

A. The committee did not make an effort to find the communists or ex-communists on any morning newspaper or any other newspaper. The committee did call before it [fol. 226] communists or ex-communists, in some cases other persons, believed by the committee to have information concerning the communist conspiracy who worked on other newspapers, and some who had worked on no newspapers.

Q. How would you compare the percentage of ex-communists on the New York Times with that on the other morning newspapers?

Mr. Hitz: I object.

The Court: The objection is sustained.

By Mr. Rauh:

Q. Isn't it a fact, Mr. Sourwine, that a far smaller percentage relating to the New York Times were shown to be communists or ex-communists than the percentage of ex-communists on the staff of the subcommittee?

Mr. Hitz: I object.

The Court: The objection is sustained.

By Mr. Rauh:

Q. Mr. Sourwine, I would like to show you Exhibit 7 again, Government's Exhibit 7.

A. That is the document entitled "Part 17?"

Q. Yes, it is. And I refer you to the testimony of Robert Shelton and ask you to read, if you would be so kind, the marked passage from the bottom of 1721 to the top and through the marked part of 1722.

A. In other words, let me be sure, you want me to read

[fol. 227] from here, where you put a pencil mark, down to here?

Q. Yes, I do.

A. Surely.

(Quoting):

"Mr. Sourwine. Did you ever write obituaries?

"Mr. Shelton. Write obituaries?

"Mr. Sourwine. Yes, sir.

"Mr. Shelton. That is not my job, sir.

"Mr. Sourwine. Did you ever write obituaries?

"Mr. Shelton. I may at one time have rewritten an obituary, but my job is that of a copy editor.

"Mr. Sourwine. Did you write the obituary for Richard H. Krebs, Jan Valtin?

"Mr. Shelton. I do not write obituaries. The answer to that is 'No,' sir.

"Mr. Sourwine. Right.

"Mr. Shelton. I am raising the question since this is not a question of the investigation of the press, why you are asking why I have written—

"Mr. Sourwine. Are you, sir, a member of the Communist Party, U. S. A.?"

[fol. 228] Q. Now, Mr. Sourwine, what was the pertinence of the question concerning the obituary on Richard Kreb, Jan Valtin?

A. The committee was endeavoring—I think this will answer your question—

Mr. Hitz: Excuse me just a moment. I think I will object to that as irrelevant and immaterial. It is not one of the questions in the counts.

The Court: Yes, it is no charge that the witness was charged with contempt for failing to answer. I am going to sustain the objection.

By Mr. Rauh:

Q. Did the committee have a copy of the obituary at the time it asked the question?

Mr. Hitz: I object.
The Court: Sustained.

By Mr. Rauh:

Q. Is this the obituary?
A. This is a photostat of Page 27 of the New York Times for Wednesday, January 3, 1951, and in Column 3 there is a headline: "Jan Valtin wrote 'Out of the Night,' former communist spy who had worked with the Nazis—

Mr. Hitz: Mr. Sourwine, please don't read that. It wouldn't even be offered in evidence.
Mr. Rauh: I didn't ask you to read it. I only asked you [fol. 229] to state whether that was the obituary you were referring to, and I am trying to do this painlessly, sir, too. I recognize that you have ruled the line objectionable. I have to perfect the record. I am trying to do it as painlessly as I can.
The Court: Has the witness answered the question?
Mr. Rauh: No, sir. The question is: Is that the obituary to which you referred?
Mr. Hitz: I do object to that.
The Court: Do you object?
Mr. Hitz: I do object, sir.
The Court: The objection is sustained.
Mr. Rauh: I would like to offer this as an offer of proof.
The Court: The record will show that the instrument—marked what?
The Clerk: It hasn't been marked, Your Honor.
Mr. Rauh: I will have it marked as Defendant Exhibit for identification No. 4.

(Defendant's Exhibit 4 was marked for identification.)

Mr. Hitz: Does it bear a date so we can identify it?
Mr. Rauh: Yes.
Mr. Hitz: What is the date?
[fol. 230] Mr. Rauh: Defendant's Exhibit No. 4 is a photostat copy of the New York Times for Wednesday, January 3, 1951.

The Court: The record will show that that was offered, counsel, and objected to as irrelevant and immaterial, and the objection was sustained.

By Mr. Rauh:

Q. Was this the only occasion in these hearings where you questioned pieces in the New York Times?

Mr. Hitz: I am sorry, questioned pieces?

Mr. Rauh: Yes.

Mr. Hitz: I object to the question as being not understandable.

Mr. Rauh: Well, I will restate the question.

By Mr. Rauh:

Q. Was this the only occasion when you asked witnesses questions concerning articles and editorials in the New York Times?

Mr. Hitz: I object, Your Honor.

The Court: The objection is sustained.

Mr. Rauh: Will you kindly mark this, please?

(Defendant's Exhibit 5 was marked for identification.)

By Mr. Rauh:

Q. I show you Defendant's Exhibit for identification [fol. 231] No. 5 and ask you what it is?

A. It is a portion of a newspaper, probably the New York Daily News, Tuesday, December 27, 1955. It is a column set two columns wide, the "Capitol Stuff" column by John O'Donnell. The date on the column is Washington, December 26.

Q. Did you see that column at the time?

A. I believe I did.

Q. Did you talk to Mr. O'Donnell before it was written?

A. Undoubtedly, but I don't believe I talked to him immediately before it was written or about the material that is in that column. I talked with Mr. O'Donnell on the telephone numerous occasions over the year.

Q. Is it your testimony you never talked to Mr. O'Donnell on the question of the investigation that we are considering here?

A. I don't believe I did.

Q. You never talked to Mr. O'Donnell?

A. That is my recollection.

Mr. Hitz: Does that bear a date the 22nd or the 26th?

Mr. Rauh: The 27th.

(Defendant's Exhibit 6 was marked for identification.)

[fol. 232] By Mr. Rauh:

Q. I show you Defendant's Exhibit for identification No. 6 and ask you what it is?

A. It is a clipping from the New York Times, including the New York Times' masthead. The date is not shown. This is from the editorial page. Of course, the masthead is there. The editorial is entitled, "The Voice of a Free Press."

Q. Have you ever seen that before?

A. Yes, sir, I have seen and read this editorial.

Q. You commented upon it at the time of the hearing, did you not?

A. I don't remember.

Q. Didn't you say you were flattered to be mentioned by the editorial?

A. Oh, no, sir.

Mr. Hitz: Please don't answer until I have an opportunity. I do object to it.

The Court: The objection is sustained.

Mr. Rauh: We offer it in evidence.

Mr. Hitz: I object to it.

The Court: The objection to the offer is sustained.

Mr. Rauh: Will you please mark that as No. 7?

(Defendant's Exhibit 7 was marked for identification.)

[fol. 233] By Mr. Rauh:

Q. I show you Defendant's Exhibit No. 7 for identification and ask you what that is?

A. This is a committee print of a report of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws to the Committee on the Judiciary, United States Senate, 84th Congress, entitled "Strategy and Tactics of World Communism," subdivision, "Significance of the Matusow Case."

Q. What is the date on the front cover of that publication, Mr. Sourwine?

A. April 6, 1955.

Q. And when was it released by the committee?

A. Oh, I think a good many months later.

Q. And when, exactly?

A. I am sorry, I don't remember the precise date.

Q. Isn't it a fact, Mr. Sourwine, it was released the week before these men were called on the stand, including the defendant?

A. About that time, yes, sir. You must understand, Mr. Rauh, if you don't already, that these reports carry the date in many instances, for instance, when the first copy is sent to the printer. There is a great deal that goes on between the time the first piece of copy is sent to the printer and the time the report as approved by the sub- [fol. 234] committee is issued. This is a subcommittee print that you have there.

Q. It is a regular practice, is it, that reports are dated nine months before they are issued?

A. Oh, no, it is not the regular practice at all. But a report, when it goes to the Government Printing Office, begins to carry that date, and it carries that date, unless and until somebody edits that date out. In this case it was not done, and that date speaks of the time when the first piece of copy on the report went to the printer for galley proofing.

Q. This document reflects on the New York Times, does it not?

A. That is a conclusion I would not care to draw, sir.

Q. Well, I would like to read you some of it and see if we can draw the conclusion. I refer to Page 28.

Mr. Hitz: I object to the reading of it, unless it is being offered in evidence or a portion of it is being offered in evidence.

OFFER IN EVIDENCE

Mr. Rauh: I will offer the whole document in evidence.

Mr. Hitz: Could I see the part you propose to read so I will know what to object to?

Mr. Rauh: It is 28 and 45, Mr. Hitz, the footnote on 28 and the quote about the New York Times on 45.

[fol. 235] Mr. Hitz: Is this part of a question asked of the witness?

Mr. Rauh: Well, there is an offer of the document before His Honor.

The Court: The whole document?

Mr. Rauh: I was offering the document, yes, sir.

The Court: The whole document pertains to the same thing?

Mr. Rauh: No, sir, but I think the circumstances of the document are significant.

The Court: Very well, there is no objection, I will let it go in.

(Defendant's Exhibit 7 for identification was received in evidence.)

By Mr. Rauh:

Q. Now, the Footnote 8 on Page 28, I will read you the footnote, and then I would like to ask you some questions, unless you would prefer to read it yourself.

The Court: Do you have two copies of it?

Mr. Rauh: No, sir, I am sorry. This was the last copy at the Internal Security Subcommittee; in fact, I am going to have to get a photostat of it or something.

By Mr. Rauh:

Q. Mr. Sourwine, which is your preference, that you read it or that I read it to you?

[fol. 236] A. I have no preference, Mr. Rauh.

Q. Well, then, I will read it to you. (Quoting):

"In his appearance before the subcommittee in Salt Lake City, Matusow was asked if he had attended Communist Party schools in which instructions were given with respect to infiltration of labor unions as such. He answered in the affirmative and gave the following statement to illuminate his reply.

"'Mr. Matusow. For instance, the American Newspaper Guild, of which I am a member now, might be an illustration. In 1950, I attended Communist Party meetings, caucuses, in the Newspaper Guild in New York. It has a large membership and is not a communist-dominated union, but in New York City today, there are approximately five hundred dues-paying communists working in the newspaper industry. The New York Times has well over one hundred dues-paying [fol. 237] members. Time, Inc., has seventy-six Communist Party members working in editorial and research, and just a few months ago the communist caucus regained control of that unit in the Newspaper Guild. They go into a union meeting and have the old adage, 'Come early and stay late; plant a few communists on the rules committee to use Roberts' Rules of Order and Parliamentary Procedure in order to stop any resolution that a legitimate union member might want to pass that the communists don't agree with, and continue to agitate along those lines.'

That is the completion of the quote from Mr. Matusow. Now, going on with the report:

"It developed during the course of the recent hearings that Matusow had given a statement of 'clarification,'"

and the next four lines are underlined by the report,

"not recantation or retraction, to the New York Times on September 28, 1953. This clarification was in an affidavit sworn by him."

[fol. 238] Pertinent paragraphs from the affidavit follow:

First paragraph numbered 3:

"The public statements by me which were the subject of discussion were statements to the effect that as a former member of the Communist Party and an undercover observer within the Communist Party for the Federal Bureau of Investigation, which activities took place between the fall of 1946 and February, 1951, it was my belief and understanding that there were some 120 Communist Party members among the employees of the New York Times. I made this statement in testimony at a hearing of the subcommittee of the United States Senate Committee on Internal Security at Salt Lake City, Utah, on October 8, 1952. I made this statement also at numerous times in speeches during the latter half of 1952 at political meetings, generally under Republican Party auspices, in connection with the national political campaign, at various places in [fol. 239] the States of Washington, Nevada, Utah, Montana, Idaho, Wisconsin and Ohio. In most, if not all, cases the statement was accompanied by the qualification I did not believe the New York Times to be a pro-communist newspaper, nor its editorial content to be pro-communist, but that I was simply citing it among other publications and information media, and the United States Government itself, as an example of the dangers of communist infiltration.

"4. While these statements were intended to serve a constructive purpose in the cause of anti-communism, extended reflection has convinced me that their generalized nature was such as to cause incorrect inferences and reflect unfairly on the Times and therefore defeat their purpose. Therefore, I wish to explain the basis of these statements."

Now, Mr. Sourwine, you are familiar with this report?

A. Yes, sir.

Q. And you said that the affidavit which Matusow gave [fol. 240] the Times was not a recantation or retraction?

A. I didn't say that.

Q. The report says that.

A. The report says that.

Q. And isn't it a fact that the affidavit also says that there were no more than six communists on the Times and that that is left out from this statement?

A. No, sir.

Mr. Hitz: I object.

The Court: I think the witness has already answered the question.

Mr. Hitz: I still would like my objection to stand.

The Court: The objection would have been sustained, and if you move to strike—

Mr. Hitz: I move to strike his answer.

The Court: —it will be stricken.

By Mr. Rauh:

Q. Isn't it a fact, Mr. Sourwine, that this document was put out just before the hearings to further the attack on the New York Times?

A. It is not a fact. There was no attack on the New York Times.

Mr. Rauh: In view of the fact that Mr. Sourwine has answered that question, I would now like to go back to my [fol. 241] first question, which is: Isn't it a fact that this same affidavit that was quoted here contains the statement that there were only six communists on the New York Times and that that favorable statement of the Times was deliberately left out?

Mr. Hitz: I am not going to object this time. I think that helps us quite a bit.

The Witness: I don't remember that the affidavit said that, sir.

By Mr. Rauh:

Q. Maybe I can refresh your recollection.

Mr. Rauh: Will you mark this for identification, please?

(Defendant's Exhibit 8 was marked for identification.)

By Mr. Rauh:

Q. I show you Defendant's Exhibit for identification No. 8, which has been referred to previously but not marked, and ask you to read, not into the record, but to yourself, the parts of the document that I have marked, and ask you if this in any way refreshes your recollection about the question I asked you.

A. No, sir, that doesn't refresh my recollection. Everything in there I recalled quite clearly at the time you asked the question.

[fol. 242]

OFFER IN EVIDENCE AND OBJECTION THERETO

Mr. Rauh: We offer Exhibit No. 8.

Mr. Hitz: We object to it.

The Court: The objection is sustained.

Mr. Hitz: Can you give me the date?

Mr. Rauh: Oh, sure. The 6th of January, 1956.

By Mr. Rauh:

Q. Is it your statement that the Matusow affidavit quoted there does not contain the statement that there were only six communists on the Times?

A. That is correct, that is my statement.

Q. Your statement is that it does not contain it?

A. It does not contain the statement that there were only six communists on the New York Times.

Mr. Rauh: May we have just a short recess at this time? I was going to look at my notes, and I would request it to save time.

The Court: At this time we will take a recess for ten minutes.

(Whereupon, a short recess was taken.)

By Mr. Rauh:

Q. Mr. Sourwine, I refer to Defendant's Exhibit 7, the report on the significance of the Matusow case, and ask you if you were responsible for its preparation?

A. I had general supervision over the first draft of that report, sir, and I worked on subsequent drafts.

[fol. 243] Q. And you have read the affidavit of Mr. Matusow?

A. Yes, sir.

Q. Do you know whether that affidavit has ever been printed?

A. No, I don't. The committee printed a part of it. The New York Times printed excerpts from it. I don't know that the whole affidavit has ever been printed.

Q. I would like to read you this sentence and ask you if it is incorrect. This is from Defendant's Exhibit 8 for identification:

> "In 1953, however, Matusow gave an affidavit to the Times in which he said he knew of no more than six communists who have worked on the Times when he, Matusow, was a member of the Communist Party."

Was a statement to that general effect in the affidavit?

A. As I remember it, the affidavit did state that Matusow personally knew of no more than six communists. It went on to explain why and on what basis he had given his estimate of in excess of a hundred.

Q. And why was this not included in the footnote that I read you, where you put forth some of what you refer to as pertinent paragraphs of the affidavit?

A. I am not sure that I can answer that question ade-
[fol. 244] quately. I can only tell you what I know of why it wasn't in there. The person who suggested that that go in did not feel, and I may say I concurred with him, that it was necessary to do more than cover the point on recantation, which is the reason that it was footnoted in the report.

Q. Do you think that is a fair presentation, to leave out the significant part of the Matusow affidavit, namely, that he knew of no more than six communists?

A. I don't think that report is unfair, sir.

Q. You repeated in the report the 126 communists charged by Matusow against the Times a second time, did you not?

A. I am not sure that I understand you, sir. You say I repeated—

The Court: Isn't the exhibit in evidence?

Mr. Rauh: Yes, sir.

The Court: If the exhibit is in evidence, the Court can refer to it and see what it says, without asking the witness over and over what is in the report.

Mr. Rauh: If Your Honor please, before we excuse this witness, in the light of the memorandum which we submitted this morning, we would like to repeat our request for the "anonymous tip" letter which was received by the Senate Internal Security Subcommittee and which seems to be available to it.

[fol. 245] The Court: The request will again be denied at this time.

Mr. Rauh: I have no further questions.

Redirect examination.

By Mr. Hitz:

Q. Mr. Sourwine, did the subcommittee ever report to the full committee and did the full committee ever report to the Senate the result of or a summary of these particular hearings? I am speaking now of the hearings particularly as contained in Part 17, these various individuals concerning whom you questioned.

A. No, sir, I don't believe that has been done.

Q. As a matter of fact, has that investigation been completed to a point where it is in shape to be reported on?

A. The committee does not consider that it has been completed, sir. I know it is still going on actively.

Q. That is, the communist activity in New York as it appears in the subhead, "Strategy and Tactics of World Communism?"

A. That is correct, yes, sir.

Q. Now I think you have testified that the rule, that is, Rule No. 1, as contained in Defendant's Exhibit No. 2, which rule states that "No major investigation shall be undertaken without a majority vote of the subcommittee," or words to that effect, was passed in early 1955; is that correct, sir?

[fol. 246] A. Yes, sir, February 7.

Q. Now, the investigation that concerned itself with Part 3 of Resolution 366, generally relating to communist activities as distinguished from the operation, administration and effectiveness of the Internal Security Acts referred to in Parts 1 and 2, was that investigation commenced?

Mr. Rauh: Objection on the ground that, as far as I know, there is no testimony that this investigation was commenced under Part 3 of the resolution. This is the first I have heard of the breakup of the resolution, and I object to the form of the question as assuming things that are not in evidence.

Mr. Hitz: I will reframe the question.

By Mr. Hitz:

Q. What part of the three parts of Resolution 366 was strategy and tactics of world communism investigation undertaken, sir?

A. Under the third part, sir.

Q. Was the investigation which ultimately became entitled "Strategy and Tactics of World Communism" undertaken before or after the passage of the rule that I have referred to?

A. Before, sir. It was undertaken as soon as the committee began its activity. It was one of the basic instructions to the subcommittee from the Senate.

[fol. 247] Q. Now, you testified on cross examination yesterday, in answer to questions directed to that subject, about your reaction to the testimony of Mr. Shelton when he appeared in executive session, and in the course of so testifying, you referred to his refusal to answer the question concerning Communist Party membership on his part.

A. Yes, sir.

Q. And with reference to that, I believe you stated that that was one of the principal matters that caused you to believe that you did have the right man after all, that is, the man that you were seeking as an employee of the New York Times, having been so identified by your informant. My question now is, did you have any reaction that you can now recall on that subject when he stated that he would

not tell you whether in his opinion the Communist Party was a political party in the usual sense? Did you have a reaction when he took that position with respect to that question?

A. I did.

Q. What was that reaction?

A. Well, that greatly strengthened my belief that we had the right man, Mr. Hitz, because that position is only taken by someone who is at least friendly towards and sympathetic with the communist cause.

Q. Has that been your experience as counsel for this committee, having these duties over a period of years?

[fol. 248] A. Yes, sir.

Q. Mr. Sourwine, can you give us the date when Winston Burdette testified before your subcommittee, approximately?

A. Not from memory, sir.

Q. If I show you a copy of committee hearings entitled "Strategy and Tactics of World Communism," subhead, "Recruiting for Espionage," would you be able to refresh your recollection on the date of Burdette's testimony?

A. Yes, sir, I would.

The date of Mr. Burdette's testimony, the beginning of his testimony, was Wednesday, June 29, 1955.

Q. Did the person who wrote the letter, who mentioned that there was a man named Shelton employed at the Times, by the New York Times, who might be able to give you information concerning communist activities at that place—did he write that letter before or after Mr. Burdette gave the testimony?

A. After.

Q. Did the person who wrote that letter mention other persons than Mr. Shelton in the same connection?

A. Yes, sir.

Q. Can you tell us how many others he named?

A. No, I am sorry, I can't. I don't recall the precise number.

Q. Can you give an approximation, such as there were [fol. 249] two or three, or maybe five or ten or twenty?

A. I think there were probably fifteen or eighteen persons named in that letter, different information of different grades about the different persons.

Q. The testimony of Mr. Burdette was in open session, was it, sir?

A. He testified in open session on the date I named.

Q. Do you see here today the person who testified in executive session on December 7th and in open session on January 6, 1956?

A. Mr. Shelton is here, sir, yes. He is sitting over there at the counsel table.

Mr. Hitz: No further questions, Your Honor, thank you.

Recross examination.

By Mr. Rauh:

Q. Mr. Sourwine, did I understand you to say this letter to which the Government has again adverted contained fifteen or eighteen names?

A. That is my present memory, so I wouldn't be precisely sure about the number of names.

Q. And how many had the first names on them?

A. I am sorry, I wouldn't be able to tell you that without examining the letter.

Q. When did you last see the letter?

[fol. 250] A. It has been over a year, sir.

Q. Yesterday, when I asked you to tell me everything about that letter you could, you didn't mention fifteen or eighteen people. Now will you tell us everything you can remember about that letter, the contents of that letter?

A. Not unless the Court orders me, sir, because the letter, in my judgment, is confidential to the Internal Security Subcommittee. I don't believe I have the right to reveal anything about that letter that is not pertinent to this case and directly bearing on the subject matter I am here to testify about.

Mr. Rauh: If Your Honor please, the one point that there can be no argument about on the cases cited in that memorandum is that when the Government comes into court, if there is something material, its confidentiality is not a ground for withholding it. As a matter of fact, I understand the United States Attorney to agree with that position.

Here we have a case of a man trying to tell part of what is in a document and not being willing to show the document, and now suggesting he wouldn't tell what the rest of the document says. I am trying to prove from this document that they didn't have a lead on this Shelton. Now we get little dribblets come out about this document seen by this witness more than a year ago. It seems to me we are more and more showing the need for the document itself. I can't understand any ground the wit-
[fol. 251] ness has a right on which not to tell us the contents of that document.

Mr. Hitz: I would like to object to the question as being not material and, furthermore, being beyond the scope of proper recross examination of this witness.

Mr. Rauh: The United States Attorney brought up this letter and put in the fact there were fifteen or eighteen names.

The Court: I think it is within the scope, all right, counsel, of recross examination. I still have some misgivings about whether we can require the letter to be brought here or not. So far as any material in the letter given by an informant that doesn't pertain to this particular action, certainly, I would sustain the objection that that part of the letter isn't material. As far as any other names that were mentioned in the letter, the names of the people, this Court is not going to require those names to be brought here. I haven't fully made up my mind yet with respect to some parts of the letter. Of course, counsel understands, even if the Court directs it, it is a matter then for the Senate to determine whether they will permit that document.

Mr. Rauh: In the event that they should not permit it, however, I assume in line with what happened in the Coplon and other cases, that it would be up to the Judge, then—

[fol. 252] The Court: As far as anything material in the letter is concerned, that will be true, whether it is confidential or isn't confidential.

Mr. Rauh: We would be entitled to an acquittal.

The Court: I agree with those authorities, there is no question about that, but for the moment at least, I am

still not going to require the letter to be brought, for the moment at least.

Mr. Rauh: The issue, as I understand it, here, sir, is that the Government has objected to my question, which was brought about by the fact that on redirect examination, they opened the letter and put in some more material.

The Court: I am not sustaining the objection on the ground that it is not proper recross. The Government did bring out the additional information from the witness that the letter contained a number of other names. The whole thing may be immaterial if the Government is correct in its contention that they may call a man from the street, even though they may have referred to the letter here. I am not convinced—I haven't seen any authorities to the effect that they still can't rely upon the fact that they can bring the man from the street, if that is the law, which it apparently seems to be from some of the cases, on the one question, which, of course, will be pertinent from the face of the question, and that is when the witness was asked whether he was a member of the Com-
[fol. 253] munist Party. In your memoranda, which I haven't had a chance to pursue very much, you seem to take the position that the Government, once having referred to the letter, can't go back and rely upon the man in the street doctrine, so to speak. I am not sure about that.

Mr. Rauh: May I say this, sir, on that point. I don't want to be in the position of arguing something you don't want me to, but on that particular point, if I may say this. We are not saying that they can't rely on the man in the street doctrine. But the Government has us in this dilemma: we are, I feel, somewhat on the horns of this dilemma, which they have put to us. They say they can haul the man off the street, and I am perfectly willing to litigate that all the way. They also say, but we are also going to prove that this isn't the man on the street case, and then they wouldn't give us the information which we are entitled to to disprove that this isn't the man on the street case. They want two strings to their bow, but they don't want to let us answer the second string.

The Court: Maybe they can rely on either string of the bow.

Mr. Rauh: I think they can. I am perfectly willing that they rely on both strings, but I just want a chance to prove that they do have the man on the street case and not the probable cause case. That is all I am asking for. They [fol. 254] started this, I didn't. They asked this witness what information he had, and he gave the contents of a letter without indicating it was the contents of the letter.

The Court: For the present, the Court has ruled and you may proceed. You have further recross.

Mr. Rauh: I take it that you sustain the objection to my question further going into the contents of this letter, sir?

The Court: Yes.

Mr. Rauh: May I please have Government's Exhibit 6?

By Mr. Rauh:

Q. Will you show me, please, or read me the question and answer you were referring to on recross that caused you to say you knew this gave you suspicion that the defendant was friendly or sympathetic toward the communist cause other than the plea of the First Amendment?

The Court: You refer to the question that was asked on redirect.

Mr. Rauh: Redirect, yes, sir.

The Witness: (Quoting):

"Mr. Sourwine. Do you, sir, consider the Communist Party to be just another political party, just like the Republican Party, in the connotation in which you mentioned it?"

[fol. 255] By Mr. Rauh:

Q. And the answer?

A. (Quoting):

"Mr. Shelton. I wish to stand on the statement which I have made."

Q. And it was this refusal to say that he didn't consider, didn't negative your question, that caused you to

say that you were suspicious that he was friendly or sympathetic to the communist cause?

A. His refusal to answer that question, yes, sir.

Q. And that people who take this position, you found, are, did you not testify to on redirect, sympathetic or friendly to the communist cause?

A. Yes, sir. I think every loyal American who is not sympathetic to the communist cause by now, if he is intelligent, realizes that the Communist Party is not a true political party, but is a part of an international conspiracy. The Supreme Court has found that, the Congress has found that, and I think anyone who knows anything about the subject understands that now.

Q. Do you know where the statement, "Communists, we may assume, carry on legitimate political activities," comes from?

A. No, sir.

Q. Would it surprise you if I told you that it came [fol. 256] from Communications Association v. Dowds, a decision of the United States Supreme Court?

A. Not at all.

Q. You wouldn't consider that a pro-communist remark?

A. I would not, no, sir. There is a great deal of difference between that communists as individuals do and what the Communist Party does and order its members to do.

Q. Do you think that the Communist Party carries on legitimate political activities as well as other activities?

A. As a party, no, sir, I do not. I think the Communist Party has for some years attempted to masquerade as a legitimate political party. I don't think it ever was.

Q. You are making the distinction, then, between communists and the Communist Party?

A. I think you made it, Mr. Rauh.

Q. I asked you whether you agreed with this decision or the statement of the Supreme Court, "Communists, we may assume, carry on legitimate political activities."

A. Yes, I think that is true. I think they do. Communists have run for office in the United States, which is every man's right. When a communist runs for office, he is carrying on a legitimate political activity; whether he

is carrying it on for communist purposes is another question.

Q. What was so terrible about what Mr. Shelton did? That is what I didn't understand.

[fol. 257] A. I don't think I said it was terrible. I said that, to me, it identified him in my mind as a person who was friendly with or sympathetic to the communist cause.

Q. This statement from the Supreme Court doesn't identify them in your mind the same way?

A. No, it does not. I concede the distinction between the two statements, those of the witness and the statement of the Supreme Court.

Q. Now, you say this investigation is still going on actively?

A. Yes, sir.

Q. Now, it was a year ago you had fourteen plus a brother out of eighteen New York Times people before the committee in public session. What has been done since then?

A. Are you asking me to tell you everything the Internal Security Subcommittee has done?

Q. On newspapers in New York, yes.

A. Mr. Rauh, I don't believe I have the right to give you information about the confidential activities of the committee not bearing on the case of the man here on trial. I would do so if the Court orders me to; otherwise, I feel I must decline.

The Court: I will not require you to divulge any confidential information of the committee.

By Mr. Rauh:

[fol. 258] Q. Had you anybody in executive session in the committee from the New York papers since this time?

Mr. Hitz: I object: irrelevant and immaterial.

Mr. Rauh: I move that the previous testimony of this witness on redirect, that the inquiry was still going on actively, be stricken from the record on the ground that I have not been allowed to probe into the truth of that statement.

The Court: The motion will be overruled.

Mr. Rauh: I have no further questions.

Mr. Hitz: Your Honor, Mr. Rauh asked one question concerning the letter of the informant, which was: Please relate everything that was contained in the letter. I made an objection on two grounds: one, that it was beyond the scope of the recross and, second, that it was immaterial. Your Honor, as I understand it, sustained the objection on the ground that it was immaterial. Then Mr. Rauh asked Your Honor if he was precluded from asking all other questions concerning that letter, and I believe Your Honor informed him that that was the effect of the ruling. However, I would like to state to the Court that perhaps it might be better, in my opinion, if Mr. Rauh has any more questions on that subject, to ask them, so that we may determine if any of them might fall within the area concerning the testimony of Mr. Sourwine which was admitted here on behalf [fol. 259] of the Government. Otherwise, Mr. Rauh will, if there should be a conviction in this case, have a very considerable length of time to see if he could conjure up one material question and he will then, of course, be able to say that he was precluded from any and all questions from now on.

The Court: The Court hasn't fully yet determined or fully made up its mind whether we will not ask the Senate to bring the letter down. If the Court finally determines we will not, then, of course, I will permit Mr. Rauh to ask such other questions as the Court may think is material upon the things that are material to this case.

Mr. Hitz: That will cover my thought on the matter, thank you.

The Court: Are there any further questions of this witness?

Mr. Hitz: No further questions by the Government.

Mr. Rauh: No further questions, Your Honor.

The Court: You may stand aside, Mr. Sourwine.

I take it you had better stay around, I mean, for a while at least. Will there be any further questions, Mr. Rauh? Will you have any further questions of Mr. Sourwine?

Mr. Rauh: Only in the event that Mr. Hitz' suggestions would bring about further questions. I don't have any

others in connection with the suggestion just made by the [fol. 260] United States Attorney.

The Court: For the moment, maybe you had better stay a little while, Mr. Sourwine.

GOVERNMENT RESTS

Mr. Hitz: We have no further testimony, and we rest.

Mr. Rauh: I have a motion for a judgment of acquittal. Do you care to hear me now?

The Court: I will.

Mr. Hitz: I wonder if I could be heard on that. If this is a motion for an acquittal at the end of the Government's case and before the defense proceeds with its defense case, I would like to suggest to the Court that since Mr. Rauh has offered a number of exhibits in evidence, that he is precluded from making such a motion, and he must make it then only at the conclusion of the entire case, which means at the conclusion of his case. That is a rule that appeals to Your Honor's discretion, but it is a rule frequently followed, as I understand it, in this jurisdiction and elsewhere.

The Court: Yes.

Mr. Hitz: It is a technical matter, but it just means Mr. Rauh will only be heard once instead of twice. I think that is a good plan.

The Court: Well, I will let him make the motion if he wants to now. I will not permit any argument of it now, because I don't think it is necessary.

[fol. 261] Mr. Rauh: I was going to argue it, but I will accede to Your Honor's wishes and simply make the motion. I was planning to argue it, but if Your Honor prefers to have argument at a later stage—

The Court: You make your motion. I will pass on it.

DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AND OVERRULING THEREOF

Mr. Rauh: The defendant respectfully moves for a judgment of acquittal on the following grounds:

1. The Government has failed to prove what, if any, was the question under inquiry by the committee when it called the defendant.

2. The Government has failed to prove that the questions asked the defendant were pertinent to any question under inquiry by the committee.

3. The Government has failed to prove that the question under inquiry by the committee when it called defendant was within the authority alleged in the indictment.

4. The Government has failed to prove that on January 6, 1956, the subcommittee in question was conducting hearings pursuant to the specific authority alleged in the indictment or to any grant of power from the United States Senate.

5. The Government has failed to prove that the questioning of defendant and the questions which form the basis of the indictment had any valid legislative purpose. The evi- [fol. 262] dence indicates that, in fact, the committee had no valid legislative purpose in interrogating defendant but, rather, sought to expose him and others to contempt and ridicule, in violation of the constitutional doctrine of the separation of powers which places limitations upon the exercise of legislative power.

6. The questioning of defendant and the questions which form the basis of the indictment violated the rights of defendant and others to the freedom of speech, assembly and petition guaranteed by the First Amendment.

7. The questioning of defendant and the questions which form the basis of the indictment violated the freedom of the press guaranteed by the First Amendment, and this particularly so in view of the purpose of the committee as a reprisal against the New York Times.

8. At the time the defendant was questioned, the committee had no information that he was or had been a communist or a member of a communist-front organization or any information reflecting upon him. The information in the possession of the committee reflected upon Willard Shelton, a well-known and respected newspaperman, rather than on the defendant, who was called entirely by accident. Under these circumstances, the proceedings violated the defendant's right of privacy under the First Amendment and

were not with any legislative power granted to or exercise-able by the committee.

[fol. 263] 9. Defendant's rights under the Fourth and Fifth Amendments were violated by arbitrary and discriminatory subpoenaing of defendant as a witness before the committee when there was no probable cause to believe the defendant had engaged in or had information about communism, subversion, espionage or other matters within the alleged jurisdiction of the committee. We strongly urge the rejection of the off-the-street doctrine proposed by the Government in this case.

10. 2 U.S.C. 192, that is, the contempt statute, read together with the alleged authorization of the subcommittee, is so vague and indefinite as to deprive defendant of the due process of law guaranteed by the Fifth Amendment.

Those are our ten grounds for the judgment of acquittal. I am prepared to argue it now or later.

The Court: The motion will be overruled.

Mr. Rauh: Your Honor, except for the letter, we have no evidence to present. We feel that the evidence in this case warrants an acquittal as it stands, and we do not have anything further to present.

The Court: The Court will take a recess at this time until 1:30. I want to look at some authorities myself on this question of the letter. I take it that, as I understand it, you have no testimony other than the letter itself, and, of course, you have no rebuttal testimony?

Mr. Hitz: We do not.

[fol. 264] The Court: Very well. We will stand recessed until 1:30.

(Whereupon, at 11:30 a.m., a recess was taken.)

AFTERNOON SESSION

(2:20 p.m.)

The Court: The question immediately before the Court is whether the Court will require the document which has been referred to as a letter which was in the possession of Congress and of the committee prior to the time it went to

New York for the purpose of having an executive session.

The defendant, at the outset, subpoenaed all of the records of the senatorial subcommittee which pertained to and included the name of the defendant, and this subpoena was not executed by the custodian of the records. Due to the nature of the request, the Court referring to the subpoena as a Mother Hubbard subpoena, and thus calling for a mere fishing expedition, the Court declined to issue the order requiring the execution of the subpoena. The defendant now seeks to obtain access to one letter, that is, the letter the Court referred to, in the files of the subcommittee, which letter was the source of initial information connecting this defendant with the subject under inquiry by the subcommittee, so says the witness Mr. Sourwine.

The Government resists the defendant's request for the [fol. 265] letter, urging that it contains confidential information, including the names of additional persons known or suspected to be active in the communist movement and also the pseudonym of an informant of the subcommittee who was known to properly identify the person who gave the information. The defendant contends that the confidential letter is material and relevant to this case because it is the only evidence which establishes the probable cause of the subcommittee in calling the defendant to testify before it on the occasion which gave rise to this indictment. The defendant also seeks the letter to inspect it and, if suitable for the purpose, to use it to impeach the Government witness who testified concerning the facts which gave rise to the summons of this witness before the executive session of the subcommittee on December 7, prior to the date on which the defendant was recalled to testify in Washington, D. C.

Now the Court has given very careful consideration to the application and request of the defendant for production of the confidential letter. The authorities cited by counsel for the defendant, while helpful, we do not believe quite reach the problem presented in this case.

In the Court's analysis of the matter, the evidentiary value of the letter to the issue of probable cause, assuming, without deciding, so far as the purpose of this motion is

concerned, that probable cause is an element of the offense [fol. 266] charged against the defendant, is nil. This is true for the reason that while the letter might have been the sole basis for prompting the summoning of the defendant before the executive session of the subcommittee held in New York on December 7, 1955, the defendant does not stand here indicted for his refusal to answer any questions asked him on that date. The indictment stems from the defendant's refusal to testify before the subcommittee sitting in Washington, D. C., on the 6th of January, 1956.

Thus, even assuming, without deciding, I mean, so far as the purpose of this motion is concerned, that probable cause for the subcommittee to believe that a person called before it had pertinent information must exist to render the interrogation of the witness a lawful adjunct to a legitimate inquiry by the congressional committee, the Government's evidence, we think, does clearly show that probable cause did in fact exist for calling the defendant on January 6, 1956, without respect to the letter at all, and whatever the effect of this letter upon calling the defendant in December, 1955, seems to the Court will be merely cumulative in respect to the facts which the Court thinks, maybe, constitute probable cause. I am not deciding that probable cause is necessary for the purpose of this motion, but calling him in January, 1956.

Now, on the other question of the letter being necessary [fol. 267] for the proper, shall we say, impeachment of the Government witness, or at least for the purpose of testing his credibility, I think the courts in this jurisdiction have said that if possibly evidentiary value of a document in custody of one of the coordinate branches of the Government to the defense is clearly negligible—and I would enlarge upon that by saying merely cumulative—then, in its discretion, the court may say that the interest of the accused in the use of the writing as evidence is outweighed by public policy, such as that which favors protection from disclosure of the identity of an informer or even more so that which favors protection of information affecting national security.

DEFENDANT'S REQUEST FOR PRODUCTION OF LETTER OVERRULED

So for the reasons stated, the request of the defendant for the production of the letter will be overruled.

Now I will say to counsel representing the defendant that if you want to further cross examine Mr. Sourwine on matters that might be material so far as this defendant is concerned, not as to the names of everybody else in that letter or any information in it, if you want to test his memory further on that on cross examination, the Court will permit you to do so at this time.

Mr. Rauh: I believe the defense would like cross examination on the letter, and I hope that if I go beyond any restrictions that you have in mind, that you will forgive me. [fol. 268] The Court: The Government has counsel here, and the Court will rule, I think, as to the materiality and the relevancy of the questions and as to whether you are going beyond the scope which the Court thinks might be legitimate and pertinent cross examination.

Mr. Rauh: I only meant to say it was not deliberate, but this is a tough problem of a part of a situation.

The Court: I understand. You might not agree with Mr. Hitz on what was pertinent or relevant, but we will determine that as we go.

Thereupon JULIAN G. SOURWINE resumed the witness stand, and having previously been duly sworn, was examined and testified further as follows:

Further cross examination.

By Mr. Rauh:

Q. Mr. Sourwine, how many of the fifteen or eighteen names were called in executive session?

A. I am unable to state.

Q. When did you last see this letter?

A. Something over a year ago.

Q. When did you last talk to anybody about its contents?

A. I think that question calls for a full disclosure of the [fol. 269] fact that when I reported to my office at the noon

recess, I told Mr. Morris, who is now the chief counsel of the committee, what had been the subject matter of the discussion just prior to the recess, and in that way referred to the contents of the letter. I want to state, so there will be no misunderstanding about it, that I did not at that time discuss with him what the nature of the contents of the letter were, nor ask his recollection about the nature of any of the contents of that letter. I did tell him substantially what I had testified to with regard to that letter. And I might say I don't think he was happy about the fact that I had disclosed it.

The Court: I think his question, Mr. Sourwine, was when you last talked to someone about it, and I think the only answer you need give that question was you did talk today.

The Witness: Yes, sir.

By Mr. Rauh:

Q. And when was the last previous time before that, Mr. Sourwine?

A. It would have been prior to the public session on January 6, 1956.

Q. Do I understand your answer to be that you cannot remember how many of the fifteen to eighteen were called in executive session?

A. I not only cannot remember how many of them were [fol. 270] called, I cannot remember one of those names.

Q. How do you happen to remember the defendant's name out of that list if you cannot remember any other name out of fifteen or eighteen?

A. I remember, sir, the way in which the defendant's name first came to my attention. That has been the subject of inquiry at this trial. I do not have a photographic memory of the particular letter in which the defendant's name appeared. I know that there was such a letter. I know what its contents were, as I have outlined them in substance, with regard to this defendant here. That is all that I remember about the names which were in that letter, as I have testified here before. As I have testified here before, we received a number of other communications from the same informant. Some of them had been received prior to this

time and had been checked out and worked over, and I am unable to sort out from my memory at this time which name was in which letter.

Q. You only remember out of this letter the one name out of the fifteen or eighteen, and that is the defendant; is that correct?

A. I have no actual independent memory of this particular letter as a sheet of paper and what was on it. I have a very clear memory of the series of letters which were received from this informant and of the fact that in one of those letters was the information regarding Mr. Shelton, [fol. 271] with respect to which I have testified here in this trial.

Q. Well, how do you know when this letter was received if you have no independent memory of it?

A. I don't know the precise date when it was received, sir.

Q. I thought you testified yesterday it was received approximately a month before Mr. Shelton was called.

A. I believe I testified within the period from a month to ninety days before he was called, and that is about as close as I can place it.

Q. And what was the length of the span of time in which letters were received from this informant?

A. Over a period in excess of two years.

Q. Then how can you tell, if you have no independent memory of this letter, that it was not in a different part of the two-year period?

A. Because, Mr. Rauh, I know when the initiation of the preparation of a list of witnesses for the New York hearings began, and I know that this man's name, Mr. Shelton's name, got into that list before the arrival of a letter which contained it.

Q. Did anybody else's name get into that list that was on the letter from the informant?

A. I think that is possible, sir, but I can't state with positiveness.

[fol. 272] Q. Was this a list of names on the Times or a list of names of people in general?

A. Neither.

Q. Well, tell me what it was a list of names about; you describe it.

A. It wasn't a list of names. It was a communication which gave information in various categories which might be useful to the committee. It was information of the same nature as a committee investigator working in the New York area in the employ of the committee would have furnished. It included tips on individuals who had attended communist meetings and included information on what took place at communist meetings. I am going too far. I am saying it, and I have fallen into Mr. Rauh's trap.

These communications which we received from this informant contained material of this nature. I am unable to say what this particular letter that contained Mr. Shelton's name also contained with specificity. It did contain information of this nature, because all of the communications from this particular informant did contain information of this particular nature.

Q. How can you say that if you have no independent memory of this letter?

A. Well, I can say it on the basis of my recollection that I have seen a substantial number of communications from [fol. 273] this informant. I am familiar with the writing style. I know that they were usually one or two pages. They sometimes covered the front and the back of a sheet. They were single-spaced, typewritten, and the information given was always given with the utmost succinctness. I know that we never received a letter from this individual which only contained one item of information. They were always packed with items of information of possible value to the committee.

Q. How many pages was this letter, Mr. Sourwine?

A. I am sorry, sir, I don't remember.

Q. Was this a letter paragraph by paragraph on each of the fifteen or eighteen or a discussion and then a list?

A. No, it wasn't a discussion and a list, but I don't think it was a paragraph by paragraph on each of fifteen or eighteen persons either.

You asked me, or perhaps it was Mr. Hitz who asked me initially, how many persons were mentioned in this letter, and my judgment was fifteen or eighteen different persons.

That was about average for the letters which we received from this particular informant. There would also be information which did not consist of names. That is the best I could tell you, sir.

Q. How many of the fifteen or eighteen didn't have first names?

A. Sir, since I don't remember any of the other names, I [fol. 274] can't answer that question.

Q. You can't state whether any of them didn't have a first name, can you?

A. I cannot.

Q. Now, where was this letter postmarked?

Mr. Hitz: Excuse me. I object to that. I think that is getting beyond the scope.

The Court: The objection will be sustained.

By Mr. Rauh:

Q. To whom was the letter addressed?

A. To me.

Q. To you personally?

A. Yes, as chief counsel of the Internal Security Subcommittee of the Senate.

Q. But you have turned it over to Judge Morris?

A. Well, sir, it was a committee document, not personal to me. When I left the committee, Mr. Morris became chief counsel. He acquired the safe and I presume has changed the combination, and is the proper custodian of the committee's top secret documents.

Q. Did it have a return address on it?

A. I don't believe that any of these had a return address on them, Mr. Rauh.

Q. Did you discuss this with Judge Morris at the time, the receipt of this letter?

[fol. 275] A. I have no independent memory of doing so, but I am sure that I did, because my practice was to discuss the receipt of such letters with Judge Morris when I talked with him either in person or over the telephone. I don't believe that I discussed this letter with him in detail, because at that time he was not connected officially with the committee.

Q. But you generally discussed the letters you got from this informant and other matters with him during that period?

A. Now you have added "other matters" to your question. I did frequently discuss other matters with Judge Morris. He has been a friend of mine for quite some time. If you mean to imply did I improperly discuss any committee business with him, no. I did discuss with Judge Morris usually the fact that I had received another letter from his confidential informant.

Q. Did you have a name for this informant with Judge Morris? I mean, did you call him "X" or "Johnny?"

A. We had a code name and, as a matter of fact, we did frequently refer to him as "X."

Q. As "X?"

A. Yes, sir.

Q. And he knew who "X" was and you didn't know who "X" was?

A. That is correct.

[fol. 276] Q. Do you have some "Xs" that he doesn't know about?

A. Yes, sir.

Q. Oh, you have some confidential informants that don't talk to Judge Morris?

A. That is right.

Q. And he has some that don't talk to you?

A. That is right. And Mr. Mandel has some that don't talk to either of us, and other committee investigators have sources that don't talk to anybody else.

Q. Was Judge Morris on the bench at the time you were discussing these matters with him?

A. That is my memory, sir.

Q. I believe you testified that these fifteen or eighteen names were not all connected with the Times, did you not?

A. As I remember, I testified that I didn't know that they were all connected with the Times. I don't think that they were. I doubt if we ever received a letter from this informant which was limited in names only to persons on the Times. It would have been most unlikely.

Q. Was there any connecting link that you recall in the fifteen names or eighteen names or were they just picked at random, with no connecting link?

A. Well, we come back to this problem, Mr. Rauh. I don't

[fol. 277] remember a specific fifteen or eighteen names. I

have given you as best I can as an estimate the number of names that were in the letter. Since I don't remember specifically any one of the names, and I don't remember specifically the circumstances about it, I can't answer that question, I am sorry.

Mr. Rauh: We feel we are being barred from the letter, if Your Honor please, and having the witness relying upon lack of memory, even though it is only a year ago, and I think this particularly strange from a witness who keeps asking people about things that happened twenty years ago. We would request that he be allowed to read the letter so that he can answer some of these questions about it.

The Court: The request will be denied.

By Mr. Rauh:

Q. Was the informant, to your knowledge, on the Times; that is, was "X" on the Times?

A. I don't know.

Mr. Hitz: Excuse me, sir. I object to that. I think that is irrelevant and immaterial.

The Court: The objection will be sustained.

By Mr. Rauh:

Q. Do you know anything about "X?"

A. I know what I have told you about him, sir. "X" was an individual known to Mr. Morris. He was an individual [fol. 278] who, when we began hearings with a series, so-called, which Mr. Burdette was the first important witness in, began to volunteer information that was helpful in that series of hearings. He is a person whose tips and information had checked out where we had checked it through. He was a person who Mr. Morris stated to me he knew and knew to be reliable. He was a person concerning whom Mr. Morris told me he thought it best for the protection of the identity of the informant that he wasn't even going to tell me who he was, and I accepted it on that basis and understood it on that basis.

Q. Is it your testimony that the committee first heard from "X" subsequent to Burdette's testimony?

A. No, sir.

Q. When did the committee first hear from "X?"

A. I don't know the exact date. You see, "X" furnished information to Mr. Morris—whether all orally or all written or a combination of the two, I don't know—during the time that Mr. Morris was associate counsel of the subcommittee and before he became a judge in New York City.

Q. I believe your testimony, sir, was that "X" was giving information for two years. Could you date the two-year period?

A. I said for more than two years, to my knowledge, for more than two years.

Q. Well, date the "more than two years," please.

[fol. 279] A. Well, "X" was, I am sure, giving information to the subcommittee in 1955. "X" has continued to give information to the subcommittee right down to the present time.

Q. What part of '55 did "X" start giving information?

A. I am unable to say whether he first started in 1955, but it is my understanding that he was giving information to the subcommittee in the early part of 1955.

Q. That is more than two years?

A. Well, sir, '55 and '56 would be two years, and this is January, '57. It was my judgment, sir, and still is, that he gave information to the subcommittee over a period in excess of two years. I can't prove it to you.

Q. Well now, what was the reference, then, to the Burdette testimony which came in June of '55? What is the connection of that with "X?"

A. Well, as I said, the information we got from "X" was very much like the information we would have received from a committee investigator who was working for pay. He tried to give the committee information which would be useful to the committee in what it was going forward with, and when we had public sessions on a subject. we could look to begin to get information from "X" on that subject, and we did. When we had the testimony from Mr. Burdette, then we began to get information from this informant, not ex-

[fol. 280] clusively, but in his letters, we began to get information dealing with the matter of communist infiltration in mass communications.

Q. Now, I believe you said that this information subsequent to Burdette was helpful to the committee?

A. Yes, sir, I so regarded it.

Q. And you said, I believe, that people were called as a result of it?

A. Yes, sir, I am sure they were.

Q. Since they were called publicly, I don't suppose there is any confidentiality about this. Who among the eighteen called at the hearings on January 4, 5 and 6, 1956 were names given by "X?"

A. I am sorry, sir, I would be unable to say without refreshing my recollection.

Q. Well, how did you know that he had been helpful if you don't remember who it was he was helpful with?

The Court: I think that question you might argue to the Court, but I don't believe you need to argue it with the witness.

Mr. Rauh: All right, sir, I will desist.

By Mr. Rauh:

Q. What was the pseudonym on the letter?

A. I would prefer not to answer that unless the Court orders it.

The Court: I think that is a confidential part of the [fol. 281] letter which the Court said it wasn't going to disclose.

By Mr. Rauh:

Q. It wasn't a pseudonym of, say, Napoleon Bonaparte?

A. Mr. Rauh, again, if the Court feels that I should answer that question, I would like to. If I am not going to answer it, there is no point in narrowing the field down little by little.

Mr. Rauh: I was trying to narrow it down, because it seems to me relevant. A pseudonym very often gives away the seriousness with which one takes an anonymous letter and it is sometimes determined by the pseudonym, and it was for that purpose I was trying to get the pseudonym clear, your Honor.

The Court: I remember the witness testified yesterday, in addition to the way the letter was drafted, as to the witness' familiarity with the information coming from this, plus the pseudonym. Now as to the spelling of the pseudonym or what it was, I don't see the materiality of it.

By Mr. Rauh:

Q. Do you have any reason why you used "X" in your discussions with Mr. Morris when you had a perfectly valid pseudonym to use?

Mr. Hitz: I think that is irrelevant and immaterial.

[282] The Court: Objection sustained.

By Mr. Rauh:

Q. In what fields had this "X" given information to the committee?

A. To my knowledge, in the fields of communist activity. That is rather a broad field. I can narrow that down. Virtually all of the information we got from this informant was related to communist activity. He gave on occasion information with respect to what took place at communist meetings. He gave on occasion lists of persons who attended closed meetings of the party. He gave on occasion names of individuals who would provide information for the committee either as informants or as witnesses. He gave on occasion the texts of communist documents, and he gave on occasion general information about the aims and purposes of the Communist Party in particular areas.

Q. Was this information also turned over to the Federal Bureau of Investigation?

A. I am unable to say.

Q. You had the letter. Did you or didn't you turn over the letter that came from "X" that you say includes Mr. Shelton to the FBI?

A. I am sorry, I understood initially that you had asked whether the informant gave it also to the FBI. If you are asking whether the committee gave it to the FBI, sir, I [fol. 283] consider that a confidential matter between the committee and the FBI, and I don't intend to answer the question unless the Court orders it.

Mr. Rauh: I ask that he be instructed to answer this question. I don't believe this letter exists, and this is the very point of the thing. If the letter had existed, of course, they would have turned it over to the FBI, and I ask that he be instruced to answer.

Mr. Hitz: I object to the question: irrelevant and immaterial.

The Court: I think it is irrelevant and immaterial whether he turned it over to the FBI or whether the committee kept it, counsel, and the objection will be sustained for that reason.

Mr. Rauh: I shall desist, sir.

By Mr. Rauh:

Q. Are you able to name one person named by "X" at any time over this more than two-year period who has been called before a public session of the committee?

Mr. Hitz: I object: irrelevant and immaterial.

The Court: I will permit him to state whether he is able to. I will not permit him to state who the persons are.

Mr. Rauh: Excuse me, sir, I would rather not have that. He can simply say, "I am able," and then you wouldn't let [fol. 284] me ask him to state it.

The Court: No, I am not going to require this witness to. Because of the character of these hearings, and for the reasons that I stated in overruling your motion as to the confidential information, I am not going to compel this witness to tell.

Mr. Rauh: In that event, I would rather withdraw the question, because if you simply allowed—

The Court: I have ruled, counsel.

Mr. Rauh: Then I will withdraw the question.

The Court: Very well.

Mr. Rauh: I would like to state my reason for withdrawing the question so the record may contain it.

The Court: You may put your reason in.

Mr. Rauh: My reason for withdrawing the question is that it would have permitted the witness to say he was able, without my being able to test out in fact whether he was able by stating the names.

The Court: The record will show that is counsel's reason for withdrawing the question.

By Mr. Rauh:

Q. Did you know prior to testifying yesterday that Mr. Hitz was going to ask you concerning the contents of this letter?

Mr. Hitz: I object: irrelevant and immaterial.
[fol. 285] The Court: The objection is sustained.

By Mr. Rauh:

Q. Did you make any attempt to refresh your recollection about the contents of this letter before you testified yesterday?

Mr. Hitz: I object. It is repetitious.
The Court: Objection sustained.

By Mr. Rauh:

Q. Has "X" ever identified someone who turned out not to be what "X" said he was?

A. So far as I know, no, but I want to qualify that answer by stating that not all of the information furnished the committee by "X" has been checked out by any means.

Q. Has any member of the committee or committee staff interrogated "X?"

A. I do not know. It is possible that Mr. Morris has interrogated, asked questions. He told me he knew the man. I presume he talks with him on occasion, and I would hazard a guess that he has asked him questions, but that is all I know about that subject.

Q. Has "X" ever been called in executive session?

A. Not knowing his identity, sir, I don't know. He has never been called as "X," certainly. I doubt if he is a person who has appeared before us, but he may be.

Q. Did the letter use the words, "a Shelton," or "some [fol. 286] Shelton," or "Shelton?"

A. I am sorry, sir, I am unable to quote precisely the words that were in that letter.

Q. Your testimony was not intended as a quotation from the letter?

A. It was not. It was intended to give you the substance of the information that was furnished by this informant.

Q. Did the letter contain any statement by "X": "Shelton had worked on PM?"

A. I don't believe it did. I know what you are getting at there. One of the Sheltons that I told you about—we had a little bit and piece of information about a Shelton, it concerned a Shelton who had worked on PM, and that is the reason I asked Mr. Shelton the question about it. I do not remember that this letter contained any information about the Shelton who was named in this letter having worked on PM.

Q. You don't remember that it didn't, though, do you?

A. I don't remember that it didn't. I am quite sure in my own mind that it did not, because I think I would have remembered the information which was furnished in that letter.

Q. Why would you have remembered that but none of the fifteen or eighteen names, Mr. Sourwine?

[fol. 287] A. If you were to mention, sir, the name of a person whose first introduction to the committee, so to speak, came from this confidential informant, I believe I would know that, if we had carried the thing on and called that person before us as a witness. It is a much different thing to attempt to sort out of a recollection of many names which I know were provided by this informant the particular name or names which were in a particular letter which also contained the name of Mr. Shelton. I just can't do it, sir, I am sorry.

Q. Was the name of James S. Glasser in that letter?

A. I am unable to state, sir. I don't remember specifically the names of any persons who were in that particular letter with the name of Mr. Shelton.

Q. Was the name David Fine in that letter?

The Court: Now, counsel, the witness has testified about three times that he doesn't remember the names in that letter, then you go back and start over again.

Mr. Rauh: Sir, may I just explain what I am trying to do?

The Court: I think I know what you are trying to do.

Mr. Rauh: I was giving the list of the eighteen who testified before the Senate committee in open session. One of those eighteen was Shelton. That is the one name he can remember. I would like to see if any of these other names [fol. 288] were in there and see if he doesn't remember Shelton's name because he can't remember anybody else's.

The Court: The Court has ruled, Mr. Rauh, and I am not going to rehash the same subject matter here over and over again.

Mr. Rauh: I have no further questions.

Mr. Hitz: No questions, Your Honor. Thank you, Mr. Sourwine.

The Court: Do you conclude the testimony, gentlemen, on both sides?

Mr. Rauh: No, sir.

OFFER IN EVIDENCE

I would like to offer the affidavit of Matusow, which was referred to in the cross examination of Mr. Sourwine this morning.

The Court: I thought you offered that document.

Mr. Rauh: No, sir. I offered the report of the committee which contains extracts from the affidavit but does not contain the part of the affidavit which we believe was particularly relevant and which shows the hostility of the committee to the Times.

The Court: Very well, you may mark it.

Mr. Rauh: I would want to have this marked and then offer it. This is the file copy of the committee, and some arrangement will have to be made to withdraw it and find another copy, and I will try to work that out with the [fol. 289] committee.

(Defendant's Exhibit 9 was marked for identification.)

The Court: I assume there are copies available.

Mr. Rauh: The only part of this that we seek to offer, Mr. Hitz, is Exhibit No. 7, appearing on Page 139 of the document.

Mr. Hitz: Hav. you offered it?

Mr. Rauh: I offer it now.

Mr. Hitz: We do not object.

The Court: Let me see it.

What part are you offering?

Mr. Rauh: I am offering the Exhibit 7, sir, and its relevance is that Paragraph 5 thereof was omitted from the report of the committee, but Paragraphs 3 and 4 were included. The purpose of the offer of 5 is to demonstrate the hostility of the committee by withholding the part that reflected favorably on the Times and including only the part which reflected unfavorably.

The Court: I will overrule the objection.

Mr. Hitz: He didn't object.

The Court: I thought he objected. I see. He said he had no objection. Well, that makes it better.

(Defendant's Exhibit 9 for identification was received in evidence.)

[fol. 290] Mr. Rauh: I believe that concludes our testimony, Your Honor.

Mr. Hitz: We have nothing further, Your Honor.

The Court: Do you want to argue this case, gentlemen?

Mr. Hitz: I would like to submit it without argument.

Mr. Rauh: I would like to argue the case, sir.

The Court: I am going to permit you to argue it if you want to. I am just making inquiry.

Mr. Rauh: Yes, I would like to argue the case.

The Court: How much time do you want, Mr. Rauh, twenty minutes?

Mr. Rauh: I have the ten points which we mentioned this morning; they are, roughly, the same points, only in justice to their merits now, I will try to do justice to them in twenty minutes, sir.

The Court: Well, I will give you twenty or thirty minutes, whatever you need.

Mr. Rauh: Is Mr. Hitz going to argue it?

Mr. Hitz: I wonder if the Court would permit me to waive my summarization of the Government's case and permit me, nevertheless, to make a reply, if need be, to Mr. Rauh.

The Court: I think that is legitimate in Oklahoma and I assume it is up here. You may proceed.

[fol. 291] Mr. Rauh: I am sorry, I am terribly sorry.

The Court: He is waiving his opening argument. He merely wants to answer you.

Mr. Hitz: If it appears to be advisable.

The Court: Yes.

ARGUMENT ON BEHALF OF DEFENDANT

Mr. Rauh: The defense contends that the Government has failed to prove what, if any, was the question under inquiry by the committee when it called defendant. Mr. Hitz, in answer to an oral question during our oral request for a bill of particulars, stated that the inquiry was the full scope of the resolution. He said as to the second asking that the Government contends and the indictment states that the inquiry being conducted was pursuant to this resolution. We do not feel and it is not the case that there was any smaller, more limited inquiry being conducted. This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose. So that in that sense, the asking No. 2 of counsel will be supplied by his reading the resolution.

The Court: You are referring to the resolution that was introduced in evidence here—

Mr. Rauh: Yes.

The Court: —in three parts?

Mr. Rauh: Yes. Mr. Hitz was referring there to Reso-

[fol. 292] lution 366.

The Court: In three parts?

Mr. Rauh: That is correct, sir.

And therefore we have a bill of particulars, if Your Honor please, which states that the question under inquiry, which is what Your Honor has to find these questions pertinent to under Section 192, is the full scope of 366.

The Court: I would like to have you particularly direct your argument to Section 3, if you don't mind. I might tell you the Court has some idea now that the inquiry might have been pertinent to Section 3.

Mr. Rauh: Yes, I shall do that.

My first point at this stage, if Your Honor please, is that there has been a variance between the bill of particulars, in which Mr. Hitz claimed that the question under

inquiry was S. 366, and the testimony of the Government that the question under inquiry was a number of other things which Mr. Sourwine then detailed. In other words, there is no testimony in this record that the question under inquiry is what Mr. Hitz said it was, namely, the full scope of S. 366. In other words, the Government has failed to prove a question under inquiry from which this Court can rule that the questions are pertinent.

As I understand the Government's burden, it is, first, to prove what the question under inquiry is and then to show [fol. 293] that these questions are related to it. Now I state that the Government has failed to prove that 366 was the question under inquiry, and since that was their statement in the bill of particulars, we have a fatal variance in their proof.

I will submit for the Court's consideration our copy of the transcript at the time that the bill of particulars was asked and responded to. It is part of the record, so it doesn't seem to me to be necessary to offer it as part of the record, but simply—

The Court: It is part of the record?

Mr. Rauh: Yes, sir, it is part of the record, but I don't know if you have it available to you.

The Court: Well, I haven't had it available, but I will have it available.

Mr. Rauh: I will submit it here.

If the Government has failed to prove exactly what the inquiry is, as we claim they have failed to prove it, then they have, per se, failed to prove that these questions were pertinent, because they cannot be pertinent to an indefinite inquiry. But if the Court should overrule our contention that they have not proved S. 366 is the question under inquiry, then we do get a question of pertinency and a question of pertinency, then, under Section 3 of S. 366.

Now, Section 3 provides: "* * * that the extent, nature [fol. 294] and effects of subversive activities in the United States, its territories and possessions, including, but not limited to, espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any movement seeking to overthrow the Government of the United States by force and violence."

The Government and the committee read this as a delegation of power in the field of communism completely unlimited, that there is nothing in the area of communism today or how far back that they cannot go. I do not so read it, nor do I believe it will be read that way when the final rulings come on this, because that assumes that the committee was given a power apart from legislation.

It seems to me that Section 3 is limited by the inherent limitation on all investigations that they have a legislative purpose, and I say to Your Honor in all sincerity that there was no legislative purpose suggested here in any way, shape or form, and Your Honor can read the entire three days of hearings at which Shelton testified and you will not find one question about legislation. I find it strange that in three days of hearings, with eighteen witnesses, many of whom were cooperative with the Government completely, there wasn't one request: Can we do something about that? Can you think of how we can improve this? This was not [fol. 295] an investigation to find legislation. This was an investigation just to show these people to the public, and that takes it outside of Section 3 on the ground of pertinence, because I believe written into Section 3 as a part thereof unspoken is that to be pertinent, it must be pertinent to a legislative purpose.

Now it seems to me further that the Government has failed to prove that the question under inquiry by the committee, when it called defendant, was within the authority alleged in the indictment. In other words, not having proved a specific question under inquiry, there was no way of showing whether this inquiry was within the authority of the committee, and, fourthly, we contend that the Government has failed to prove that subcommittee in question was conducting hearings pursuant to the specific authority alleged in the indictment or to any other grant of power from the United States Senate.

Now, may I please have Government's Exhibit 3?

The Government's entire case for authority in the subcommittee is based on which there is testimony that this is an extract from the minutes of the Judiciary Committee, and I am assuming that this is an extract from the minutes of the Judiciary Committee: "RESOLVED, by the Committee

on the Judiciary, that the Special Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws under S. Res. 366, 81st Con-
[fol. 296] gress, be continued as a special subcommittee of the Committee on the Judiciary during the 84th Congress, and that the committee report in appropriate original resolution favorable to the Senate for this purpose."

If Your Honor please, this is not a delegation of authority. The authority went from the Senate to the Judiciary Committee. This is not a delegation. This is a statement that the committee under S. Res. 366 is continued. That is not a delegation that all of the powers under S. Res. 366 were delegated. I find it strange that the witness for the Government was unable to produce one document at any time in the past, with this committee in effect for six years, that said that we, the Judiciary Committee, delegate the authority which we have under S. Res. 366 to this subcommittee. Certainly, I think Mr. Hitz or someone has suggested—I think Mr. Sourwine suggested it—that the resolution itself, because it says "any subcommittee," thereby transferred the power to the subcommittee.

The Court: Did this subcommittee, that you now indicate had no authority, report back to the full committee?

Mr. Rauh: Do they, sir?

The Court: Did they in this case?

Mr. Rauh: There have been no reports yet. We have had testimony here that there was no report.

The Court: Didn't they report back—

[fol. 297] Mr. Rauh: Oh, you are referring to the report Mr. Eastland from the Committee on the Judiciary submitted—

The Court: I am assuming that after this subcommittee held this hearing and determined to start contempt proceedings against the defendant, that they probably reported back to the full committee and the full committee, in turn, probably reported it back to the Senate. The reason I say that is because the record shows that the Senate authorized—

Mr. Rauh: I am sure that happened, sir.

I would say that was no authority whatever, and here I cite to you a square holding in—

The Court: There is no such thing as ratification?

Mr. Rauh: Rumley is perfectly clear on that. That is exactly what happened in Rumley, and they said it wasn't authorized, sir. And it seems to me that you couldn't build authorization on such a ratification basis, and one reason I particularly refer to this is that there are serious constitutional questions involved.

Now, if Your Honor please, I think maybe we both have the same dilemma, and the dilemma is the fact that this case is being tried while the constitutional issues that are involved are before the Supreme Court. But while, concededly, certain Court of Appeals' decisions seem to run against the constitutional issues that we are raising, I would [fol. 298] be the first to admit and to concede this. I happen to be counsel in the case that raises this in the Supreme Court, the Watkins decision, which is on certiorari from the decision of the Court of Appeals here.

Now that raises, as I say, a dilemma, at least for me, and I am not sure but what it doesn't raise some for Your Honor. We suggested to Judge Laws that the trial might be withheld until the Watkins case had been decided, and Judge Laws, and I am sure he gave this thorough consideration, rejected our request and said to go ahead with the trial. So that we are now before Your Honor at a time when the constitutional questions to which I am about to address myself are unclear and without final resolution. I am not suggesting the question of what Your Honor is bound by and not suggesting that you are not in some ways bound by some of the decisions, even though they are on appeal.

What I am suggesting is that with the constitutional issues in the flux that they are, and with at least their serious nature having been recognized by the grant of certiorari by the Supreme Court in this case, one ought to give serious consideration to whether there is a non-constitutional ground on which Your Honor could base this case without reaching the serious constitutional questions, and I suggest to Your Honor that there has been an absence of proof of a question under inquiry, and because there has been [fol. 299] absence of proof under questions of inquiry, absence of proof of pertinency to those questions, absence of proof of authority in the subcommittee, that the case

should be decided on those grounds to avoid the constitutional issues to which I would like to advert briefly if I am still within my allotted time.

The Court: You may.

Mr. Rauh: It seems to me that the failure to prove a valid legislative purpose is, as I say, relevant to S. 366, because I think that is a built-in condition, but it is also clearly relevant to the Constitution of the United States. If there is no legislative purpose, there is no power in the committee, and none of the decisions of the Court of Appeals have ever suggested the contrary. I think there are those who read the Court of Appeals' decision to say something like this: either you plead the Fifth Amendment or you are guilty of contempt. I have heard that said among my fellow lawyers. I don't believe that that is a proper reading of the various Court of Appeals' decisions from Barsky to Watkins to Barenblatt and Sacher. I do not believe that is what they are saying. I believe the Court of Appeals has said in these particular cases: We say there was a legislative purpose.

The Court: Barenblatt goes pretty far, doesn't it?

Mr. Rauh: It goes pretty far, if Your Honor please, but [fol. 300] it doesn't go to the point that in the absence of a legislative purpose one would still uphold the conviction. In fact, what I am suggesting, if Your Honor please, and I agree with you, Barenblatt goes pretty far—what I am suggesting is that those are cases where the court has found—I believe in some cases—one case is on appeal to the Supreme Court—the court has found a legislative purpose where I might not have found it or you might not have found it, but in each of those cases, still, they have agreed that there had to be a legislative purpose, and I say here, one will look in vain for the legislative purpose in hauling eighteen men, fourteen New York Times and one brother of a New York Times man, before the committee and never asking them one question related to legislation. I say that the proof is perfectly clear in the Government's own case that there wasn't the slightest interest or intent in legislation and nothing has ever come of this hearing or ever could come of it.

Now, there are two constitutional issues in addition to this. I put the previous constitutional issue on the absence of a legislative purpose. If one does not have one, the legislative purpose, the doctrine of separation of powers, then, prevents the action of the committee. But the First Amendment has two facets in this case. The first facet is the one that is involved in some of the other cases. Now here I [fol. 301] think I would be less than frank if I did not say that I think the decisions of the Court of Appeals do foreclose our First Amendment point, unless Your Honor feels free to consider it, because it is presently pending in the highest court. I have no desire to argue that the Court of Appeals has not in similar situations rejected a plea of the First Amendment. I simply state it—it is my obligation to state it on the record—but I am not suggesting that there is not precedent here against us. I do say on the question of a legislative purpose, however, that there, the precedents, while they have gone far to find legislative purpose, do not foreclose us, because they have never said that the inquiry could be valid in the absence of a legislative purpose, and therefore I would distinguish and could in all sincerity argue for an acquittal on the basis of the absence of legislative purpose where I would feel that I could not distinguish the First Amendment cases in the Court of Appeals.

The Court: What have they said that particularly constitute the legislative purposes in some of these other cases?

Mr. Rauh: In the Watkins case, which is the case that is now pending in the Supreme Court, they said that the mere statement of the committee chairman at the opening of the set of hearings in which he mentioned a statute was sufficient. I am contending in the Supreme Court that the [fol. 302] mere statement does not prove a legislative purpose. But at least you had there, if Your Honor please, a statement of a particular statute that they were considering as a legislative purpose. So that I would say that while I hope some day to be able to say that that was wrong, even though that was correct, that would not foreclose the proposition that if there was no shred of substance of a legislative purpose, that the defendant could be convicted.

The Court: Wasn't the statement of counsel at the beginning of one of these hearings that we are proceeding

under Section 3 here, which we will consider as a legislative purpose, and then proceed as they have in this case? You say there were no questions asked.

Mr. Rauh: Well, if Your Honor please, Section 3 simply says the type of thing that you can go after, namely, something related to communism, but it does not say the purpose with which you can go after it. It does not suggest that; indeed, I do not think that it was intended that that information could be obtained except—

The Court: Perhaps we don't quite understand each other. These cases which you say you now concede so far as the First Amendment is concerned, so far as the Circuit Court of Appeals is concerned, they have about said that is it. In some of these other cases, where the court has decided other than a statement made by committee counsel [fol. 303] in the beginning, what questions were propounded? What were some of the reasons given for the court saying it was, that the case was within the legislative jurisdiction of the committee?

Mr. Rauh: One case I know that I am clearest on is the Watkins case. The Barenblatt case I have before me. They examined the record and they found that there was a legislative purpose. I must say I am not exactly clear on what the evidence was there. There is a reference to the Veterans Readjustment Assistance Act, and there may be a reference to other statutes.

The Court: Haven't they about said that even just asking the witness a question: "Are you a communist?" or "Do you belong to an organization, any of these front organizations?"—I mean, whether you agree with it or not, but hasn't the Circuit Court of Appeals just about said that that constitutes legislation purposes?

Mr. Rauh: Not quite. I partially agree. I don't want to make a statement that I don't honestly believe. I don't think they have quite said that. They have gone very far to find it, and they have gone terribly far to find it, but they have always found it in some action. I don't believe you can find it in any action here. I admit they have gone awfully far to find it, but they have always found it, and here, I say, one cannot find it.

Now when I conceded the point about the decisions of [fol. 304] the Court of Appeals on the First Amendment, I would like to make a distinction there, if I might, sir. I was referring to the general question that has been raised by a person refusing to answer a question about communism.

The Court: I understood, counsel.

Mr. Rauh: There is still the question of the freedom of the press, on which there are no decisions, and that is not foreclosed in any way.

It seems to me that for the Court not to recognize that this was a reprisal against the Times for its criticisms of this committee and of like committees, its criticisms of Senator Eastland's views on various things, and its criticisms of the committee counsel here, is simply to close one's eyes to the reality of the situation.

The unique fact that thirty out of thirty-eight men were from the Times, and the unique fact that that is an executive session, that fourteen plus a brother were from the Times out of eighteen in open session, the fact that those persons that would not have reflected in any way on the Times weren't called in open session, the fact that shortly before this happened the committee put out a report reflecting on the Times and withholding some of the favorable information from the Times, makes it clear in my mind that this was a violation of the freedom of the press. But one doesn't have to say that. It isn't necessary for Your Honor to rule that [fol. 305] to find that there was an absence of a legislative purpose. In other words, it seems to me that the strong point here in regard to what I was trying to bring out from Mr. Sourwine, and Your Honor at times seemed to feel I was going at it a little bit too far, I did that in all effort to protect my client in a serious case before Your Honor, was that I felt that a real answer to a legislative purpose was this purpose.

In other words, there are two ways that I can prove there was no legislative purpose. One is just to show you the record and say there is not one iota of testimony in there concerning any legislative matter or anything leading to it, but there is another way, and that is by indicating the other purpose, namely, the purpose in connec-

tion with the Times. It seems to me that these are two sides of the same coin: the absence of the legislative purpose, from any indication in the record that they were interested in legislation, and the presence of an alternative purpose, which would reinforce the first.

I did not come at this lightly. I am not making this charge in a light feeling, that when you don't have anything else to do, you try your opponent. I make this in all earnestness, that part of the proof of the absence of a legislative purpose is the presence of an alternative purpose, and that, in part, I believe, explains the particular tenacity—

[fol. 306] The Court: Your point is this: You contend there is an absence of a legislative purpose.

Mr. Rauh: Yes.

The Court: Considering the whole record, there was a complete absence of a legislative purpose. That, of course, you say, would be sufficient within itself, but that you have, for the purpose of this case, gone further and assumed the burden, so to speak, by showing that there was not only an absence of a legislative purpose, but the questions you were asking were showing what the real purpose was, namely, to investigate the New York Times. I mean, that is—

Mr. Rauh: Yes. I wouldn't belabor it. That is exactly my point.

Now I don't know, I certainly don't want to reargue the question that flows from the subpoena and from the letter, particularly as your opinion just a few moments ago dealt with this subject, and I believe I should no more than clarify the record as to our position on that. Your Honor has, I think, made clear that—I believe this is correct—that Your Honor feels that the fact there was probable cause by the time of the open sessions, adequate probable cause, even though there was no probable cause at the time of the closed session.

The Court: I said that without completely deciding the [fol. 307] issue, yes.

Mr. Rauh: Then if that is open, I would like to refer to the comparison of the Silverthorne case, and I have the citation in another brief in case Your Honor would

want to look at it, Silverthorne Lumber Company v. United States, 251 U. S. 385.

Now there, one of the Government agencies went in and took some evidence they didn't have any right to, and then having the evidence, they were able to write a beautiful subpoena, naming everything perfectly. They gave the material back and then they subpoenaed it. That subpoena was quashed in a decision by the Supreme Court, and Justice Holmes said that the initial wrong carried over to the second step. That is exactly, in my judgment, sir, what you have here. I wasn't going to argue this—I didn't know you had indicated before, that I once argued after you had ruled, but since you said it was tentative—it seems to me that that is exactly what you have here.

Assuming now, without deciding again, as you were assuming, that there was no probable cause to take him before the executive session, the mere fact that probable cause came from the executive session is not probable cause. There was a wrongful act in here which has to be considered. The Silverthorne doctrine was also affirmed the second time in the second Nardone case, which, I think, is in 308 U. S.

[fol. 308] I am not completely prepared on this, because the Government never suggested yesterday nor this morning the point made by Your Honor, and it took me a little bit by surprise, but I think the Nardone case in 308 U. S. is also relevant.

These are only analogies, because I don't think we have the exact case, but there, the analogy is this, if Your Honor please. That is a case where there was a wire tap and, of course, you couldn't use the wire tap in court. But they used the wire tap to get a lead, and the Supreme Court ordered that the people testifying as a result of those leads couldn't testify. In other words, I think there is some fine Holmes' statement in the Silverthorne case which is also in the Nardone case to the general effect that you can't benefit from the fruits of your own wrongdoing.

The Court: I know that is generally true.

Mr. Rauh: I would say that those two cases come the closest to the situation which Your Honor made as a

hypothetical situation, when Your Honor suggested that you had probable cause at the second hearing, the open hearing, from what had happened—

The Court: I think what I said, if probable cause is necessary, without saying that you have to have probable cause—I might finally say that I thought the man on the street doctrine would do it, but in addition to that, if the [fol. 309] Government does have to have probable cause, then that would probably be the fact.

Mr. Rauh: Yes, I think I understood it, and then maybe just to summarize how we feel about it, you do have to have probable cause, and we cited in our memorandum some cases to support the proposition that you do have to have probable cause, and if you do have to have probable cause, and, of course, only if you have to have probable cause, then, if Your Honor please, we do not feel you can meet that probable cause by pulling a man off the street without probable cause into the first hearing and then say, "Well, we cleaned all that up. We got a new hearing." I think the spirit and analogies of Silverthorne and second Nardone would bar Your Honor, if you consult those, from making that as probable cause. Now you still have open as to whether that requires any probable cause, and we say that it does both under the Fourth Amendment and the Fifth Amendment of due process and the invasion of privacy, that probable cause is required.

Now finally, if Your Honor please, because you have been patient on the time, and I know I have gone over it, I will just state that in our opinion, 366, and particularly Clause 3, is too vague to meet the constitutional standards. Now here again, to be completely honest, I don't believe it is any vaguer than the House committee [fol. 310] resolution which has been upheld for vagueness by the Court of Appeals. I believe they are both too vague. I believe they generally give a roving commission into communist activities. But no such roving commission is warranted, that no man can tell from that roving commission whether he is required to answer questions and, therefore, that this is a violation of the Fifth and Sixth Amendments. However, I only say in all sincerity that this question, too, is in the Watkins case on a similar

roving commission, and the Court of Appeals' decisions have rejected this.

In my judgment, in conclusion, sir, in view of the seriousness of the constitutional issues which will not be decided finally for some time, we would strongly urge the acquittal on the non-constitutional grounds we have urged, and in that way, following the strong policy of the Supreme Court, the avoidance of the basic constitutional questions we have presented. Thank you.

ARGUMENT IN REBUTTAL

Mr. Hitz: Your Honor, I have only one subject I would care to touch on, unless Your Honor asks some questions of me after I have touched on this, and that is to point out the difference between this case and the Silverthorne and the Nardone cases that Mr. Rauh has mentioned.

In each of those cases, there was an illegal act directed to the defendant. In the Nardone case, there was an il- [fol. 311] legal act in the commission of a crime in violation of the Communications Act in tapping his wire. It was a penitentiary offense. The results which came to the benefit of the governmental agency in that case were found to be without justification, without warrant and illegally obtained. In that case, of course, it is different from the situation we have here. There is no question but what there was probable cause, if that be necessary, to have summoned the w ness before the executive session in New York. That was not an illegal act. It wasn't a violation of any statute. It was not a crime to have brought him there, nor did it, as in the Silverthorne case that was held, violate any constitutional right. In the Silverthorne case, the violation of the right of the defendant and the illegal act was a trespass upon him in the nature of an illegal search. We do not have that here. It has been so held in the Chapman case and in many other cases, that an inquiry conducted by a congressional committee is not a search of that person's effects or well being, or whatever, that would violate any possible claim under the Fourth Amendment against illegal search.

So that we have here a perfectly legal act in bringing the defendant before the committee in the first instance. And I say again, it was with probable cause in the very strictest sense. Now the only problem that has confronted [fol. 312] the Court in the trial of this case is not that there lacked probable cause in the subpoenaing of the defendant witness before the committee in the first instance. It was that, as a very technical matter of criminal procedure, the Government was not in a position to produce the particular document that Mr. Rauh finally thought he needed to cross examine the Government witness. So that there is a technical problem arising within the confines of this courtroom which apparently has raised some question in the Court's mind as to the advisable way finally to dispose of that defense contention. It had nothing to do with the merits and the reason for having called him initially. It has to do with the right of the defendant, as he asserts it, to further examine the witness Sourwine upon a document that we say procedurally, and as a matter of comity with another branch of the Government, and for reasons of national security, we preferred not to produce in court. Thank you.

The Court: Let me ask you a question, counsel. The Watkins case, I believe, is the one now before the Supreme Court of the United States, is that it?

Mr. Hitz: Yes, it is.

The Court: If that case was decided adversely to the Government's contention in that case, would that settle the issue in this case here?

Mr. Hitz: It would not. It would depend on what the [fol. 313] ground is. There could be many different reasons for a reversal in that case. I say conceivably. We don't concede any such proposition, but many, many reasons other than a First Amendment question that might control here, might induce the reversal, and I am not showing any lack of a faith in the case when I say that. Thank you.

Mr. Rauh: I have just two comments. First, the Watkins case raises a legislative purpose issue quite similar to this, as well as the First Amendment question quite sim-

ilar, as well as to the vagueness question quite similar. So I think on any one of those three it could probably be determined.

I would like permission, in view of Mr. Hitz' questioning of the applicability of Silverthorne and Nardone, to file a memorandum—it might take twenty-four or forty-eight hours—to file a memorandum on this very question. There seems to be a major question in Your Honor's mind, and I know Your Honor has been concerned and given real thought to the problem that has been raised here, and we would like the permission—I don't know if you can work tonight, because we are liable to be snowed in, I understand. Reports have been coming in that the snow is coming down very fast—but if we could get it done sometime tomorrow, and certainly submit it to Your Honor the first thing the next morning.

The Court: I will be glad to have it tomorrow, I would like to, and will, unless notified to the contrary, render a [fol. 314] final decision in this case by Friday morning at 9:30.

Mr. Rauh: You would like the defendant here at Friday morning at 9:30, sir?

The Court: Yes.

Mr. Rauh: Let's see. Well, I suppose we should get it in as fast as we can, under those instructions.

The Court: But if you want to file a memorandum, of course, I would like to have it as soon as possible. I will give you permission to file it.

Mr. Rauh: I will try to get it in tomorrow, because I am quite confident of the analogy of Silverthorne and Nardone to the proposition,—I am not now rearguing the other points, but to the proposition that the first hearing without probable cause, on that assumption, cannot be probable cause for the second hearing, and I would like to submit it on that general theory.

The Court: Very well.

(Whereupon, at 3:45 p. m., the trial in the above-entitled cause was recessed until 9:30 a. m., Friday, January 18, 1957.)

[fol. 315]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[Title omitted]

Washington, D. C.

Transcript of Proceedings—Friday, January 18, 1957

The above-entitled cause came on for further trial before the Honorable Ross Rizley, a District Court Judge, at 9:40 a. m.

[fol. 316]

Proceedings

The Court: Criminal No. 1215-56, United States of America v. Robert Shelton.

Are the parties here?

Mr. Rauh: Yes, Your Honor.

The Court: Very well.

This is a case which we tried Monday and Tuesday of this week, I believe, which the Court took under advisement temporarily, and the Court is now ready to render an opinion in this case.

RULING OF THE COURT

The Court: It is charged in the indictment in this case in three counts that the defendant, Robert Shelton, in contempt of the lawful powers of Congress and contrary to law, refused on January 6, 1956 to answer certain pertinent questions propounded to him by the Senate Subcommittee on Internal Security while under oath and appearing as a witness to testify in connection with an inquiry then being conducted by the subcommittee pursuant to lawful authority.

It is the Government's position that the subcommittee, while in the lawful exercise of the powers and duties conferred upon it by pertinent resolutions, caused the de-

fendant to appear before it on the 7th day of December, 1955, in New York City and again on the 6th day of January, 1956, in Washington, D. C., to testify concerning his [fol. 317] knowledge of matters pertinent to the subjects then under investigation and study by the subcommittee in furtherance of the congressional responsibilities in such areas of national concern.

It is further asserted that upon appearing before the subcommittee on January 6, 1956, the defendant refused to answer pertinent interrogatories, including the following questions, when ordered and directed to do so by the presiding officer of the subcommittee:

Count 1 of the indictment:

"Question. Are you, sir, a member of the Communist Party, U. S. A.?

Count 2:

"Did you ever have any conversation with Matilda Landsman?"

Count 3:

"What did you tell them?"

The defendant does not question the Government's proof that on the date and in the place alleged in the indictment he appeared before the subcommittee as a witness while under oath and, after being ordered and directed by the presiding officer to do so, refused to answer the questions set out in Counts 1 through 3 of the indictment. The defendant does not interpose the Fifth Amendment to the United States Constitution in justification of his refusal to answer the questions insofar as such constitutional pro- [fol. 318] vision prohibits compulsory self-incrimination.

It is the defendant's position that the evidence before this Court shows that he was justified in refusing to answer the questions because the subcommittee was acting in excess of its lawful authority (1) in calling him at all, (2) by the Government's failure to prove that any precise question within the authority of the subcommittee was under inquiry at the times in issue, (3) by the Government's

failure to prove that the hearing before the subcommittee on January 6, 1956 was pursuant to the authority set out in the indictment, (4) by the Government's failure to prove that the interrogation of defendant had any legislative purpose, and (5) that the statute defining the offense defendant is charged with committing, read in conjunction with the enabling resolutions of the subcommittee, is so vague and indefinite as to deprive the defendant of due process of law.

The defendant filed his motion for judgment of acquittal at the end of the Government's case in chief and again after all of the testimony was in, urging ten grounds as follows, which points can be fully discussed under the contentions enumerated in the body of this opinion, that is, the five subdivisions that the Court has heretofore referred to:

(1) That the Government has failed to prove what, if any, was the question under inquiry by the committee when [fol. 319] it called the defendant;

(2) That the Government has failed to prove that the questions asked defendant were pertinent to any question under inquiry by the committee;

(3) That the Government has failed to prove that the question under inquiry by the committee when it called defendant was within the authority alleged in the indictment;

(4) That the Government has failed to prove that or January 6, 1956, the subcommittee in question was conducting hearings pursuant to the specific authority alleged in the indictment or to any other grant of power from the United States Senate;

(5) That the Government has failed to prove that the questioning of the defendant and the questions which form the basis of the indictment had any valid legislative purpose. The evidence indicates that, in fact, the committee had no valid legislative purpose in interrogating defendant but, rather, sought to expose him and others to contempt and ridicule, in violation of the constitutional doc-

trine of the separation of powers which places limitations upon the exercise of legislative power;

(6) That the questioning of defendant and the questions which form the basis of the indictment violated the rights of defendant and others to the freedom of speech, as-
[fol. 320] sembly and petition guaranteed by the First Amendment;

(7) That the questioning of defendant and the questions which form the basis of the indictment violated the freedom of the press guaranteed by the First Amendment;

(8) That at the time the defendant was questioned, the committee had no information that he was or had been a communist or a member of a communist-front organization or any information reflecting adversely upon him. The information in the possession of the committee reflected upon Willard Shelton, a well-known and respected newspaperman, rather than on the defendant, who was called entirely by accident, and that under these circumstances, the proceedings violated the defendant's rights of privacy under the First Amendment and were not within any legislative power granted to or exercisable by the committee;

(9) That the defendant's rights under the Fourth and Fifth Amendments were violated by arbitrary and discriminatory subpoenaing of defendant as a witness before the committee when there was no probable cause to believe the defendant had engaged in or had information about communism, subversion, espionage or other matters within the alleged jurisdiction of the committee;

(10) That 2 U.S.C. 192, that is, the contempt statute, read together with the alleged authorization of the sub-
committee, is so vague and indefinite as to deprive defen-
[fol. 321] dant of the due process of law guaranteed by the Fifth Amendment.

And I may say, to all of these questions raised by the defendant, the Court has given very careful consideration.

The defendant is not required to adduce evidence of his innocence in the absence of proof by the Government which establishes the enumerated elements of the charged viola-

tions beyond a reasonable doubt. In criminal prosecutions for contempt of Congress, as in every criminal prosecution, the defendant is presumed to be innocent of the charges upon which he is indicted, and such presumption remains with the defendant until such time as the Government proves beyond a reasonable doubt that as to each count of the indictment, the defendant, while appearing as a witness before a duly authorized congressional committee, was directed and ordered to answer the interrogatory set out, that the specific question was pertinent to matters within the jurisdiction of the committee then under investigation, that the investigation was in furtherance of a proper congressional purpose, and that the defendant refused to answer such interrogatory when so ordered and directed to do so. (See Quinn v. United States, 349 U. S., and Bowers v. United States, 204 F. 2d).

To establish the authority of the subcommittee, the Government introduced the enabling resolution, Senate Reso- [fol. 322] lution 366, 81st Congress, Second Session, 1950, which conferred original authority upon the Senate Judiciary Committee, or any duly authorized subcommittee thereof, directing such body both to make a complete and continuing study and investigation of (1) the administration, operation and enforcement of the Internal Security Act of 1950, (2) the administration, operation and enforcement of other laws relating to espionage, sabotage and the protection of the internal security of the United States, and (3) the extent, nature and effects of subversive activities in the United States, including, but not limited to, espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organization controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force or violence.

In addition thereto, the Government introduced the resolution continuing such original authority in the Judiciary Committee, or its duly authorized subcommittees, with provisions for expenditures during the 84th Congress and copies of the minutes of the Senate Committee on the Judiciary for January 20, 1955, wherein the subcommittee in question was by resolution continued during the 84th

Congress, as well as a copy of the minutes of the Senate Committee on the Judiciary for February 7, 1955, listing [fol. 323] the names of the Senators appointed to serve upon the Subcommittee on Internal Security. The copies of the minutes of the committee were received in evidence as a part of the official records of the subcommittee over the objection that they showed no authority in the subcommittee. The Government introduced the certification of the defendant's contempt by the United States Senate to the United States Attorney for the District of Columbia, the Senate resolution ordering such certification, and a copy of Senate Report No. 1934, 84th Congress, Second Session, 1956, which sets out the proceedings before the subcommittee giving rise to the citation. The documents are in proper form, and neither their authenticity nor regularity is questioned.

Mr. Julian G. Sourwine appeared as a witness for the Government. His testimony disclosed that at the times in question he was the chief counsel for the subcommittee and personally familiar with the facts and circumstances leading up to defendant's appearances before that body. In substance, the witness testified that the subcommittee had information indicating the existence of communist activity in newspaper and publishing fields in New York City, implicating one Matilda Landsman as being active in the Communist Party and the Typographical Union in that city. Additionally, the witness alluded to confidential information in the possession of the subcommittee which provided names of several suspected communists em- [fol. 324] ployed in various capacities by certain newspapers, including the company which at that time employed Matilda Landsman and this defendant. The witness testified that the subcommittee did not have any information indicating that this defendant was either a communist or had engaged in communist activities. The subcommittee did, according to the witness, have information that one Shelton, who was employed on the news side of a particular newspaper in New York, was informed, if not active, in communist infiltration into the newspaper media of mass communication.

Upon the basis of such information, the subcommittee late in 1955 held an executive session in New York City, in connection with which a summons was issued to one Willard Shelton, at a specific address, requiring his attendance on November 23, 1955, at a time and place certain. The evidence was that the name Willard had been affixed upon the summons by error, for in fact the subcommittee did not possess the first name of the Shelton linked by name to the subversive activity it sought to investigate and study. There is evidence in the record upon the manner in which the defendant's name came to be added to this summons, but the view the Court takes of this subject is that it has no relevancy to this case or any of the issues in it. This is true for the reason that the defendant did not initially appear before the executive session of the subcommittee pursuant to the disputed summons. The sum- [fol. 325] mons served upon the defendant requiring his attendance before the subcommittee on December 7, 1955, was issued on November 23, 1955 by James O. Eastland, Chairman, Committee on the Judiciary and Internal Subcommittee, to Thomas J. Lunney, United States Marshal, Southern District of New York, who according to his official return thereof recited the service of the summons on the defendant by leaving a copy thereof with him at his place of employment on November 29, 1955.

The official transcript of the proceedings before the subcommittee involving this defendant was admitted in evidence without objection. It clearly shows beyond any reasonable doubt that at the time and place alleged in the indictment the defendant appeared before the subcommittee, was sworn as a witness, ordered and directed to answer the three questions set out in the counts of the indictment, and refused to do so. The contentions of the defendant are urged in justification of this established conduct.

I may say that in the footnote there is identified the Senate report which contains the facts relative to the summons that was served upon this defendant issued by Senator Eastland and served by the United States Marshal of New York.

Defendant's contention that the subcommittee exceeded its authority in calling him as a witness under the circumstances of this case is grounded upon several propositions. The technical objections arising from the issuance, service [fol. 326] and return of the summons were predicated upon the apparent belief that the summons originally issued to Willard Shelton was the process relied upon to bring the defendant initially within the jurisdiction of the subcommittee. As previously pointed out, the official transcript of the proceedings before the subcommittee which involve this defendant commenced on November 23, 1955, with the issuance of a summons which was personally served on defendant pursuant to lawful authority on November 29, 1955, and return thereof properly executed that same day. The summons requiring defendant's attendance before the subcommittee is sufficient on its face to bring him within the jurisdiction and authority of the subcommittee, and the Court so holds.

Defendant's contention that the subcommittee exceeded its authority in summoning him under the facts of this case rests upon his interpretation of the First Amendment to the United States Constitution. It is the position of the defendant that the authority of Congress to require the attendance of witnesses before its duly authorized committees investigating matters within the legislative powers of Congress is limited by the individual citizen's right of privacy guaranteed by the First Amendment. It is then argued that where a committee seeks to summons a witness for the purpose of taking testimony, there must exist a probable cause for the committee to believe that such [fol. 327] person possesses pertinent information on the subject under lawful investigation or such summons is without force or effect.

Proceeding upon the assumption that probable cause in the sense employed by defendant is required for issuance of a valid summons by the Congress, it is argued that the only evidence of probable cause in this case for the calling of this defendant as a witness was contained in the confidential letter linking the name Shelton with the subject under inquiry. This line of argument was relied upon in an effort to secure the confidential letter from the

files of the subcommittee for inspection and introduction into the record as the best evidence of probable cause. The Government objected to the request for the letter on the grounds that it is not material or relevant to issues in the case; that it contains confidential information, including the names of additional persons known or suspected to be active in the communist movement; it contains the pseudonym of a confidential informant of the subcommittee.

The Court carefully considered defendant's contention respecting the requirement of probable cause for issuance of a congressional summons, and the relevancy of the confidential letter to the issues in this case. The application for production of the letter was denied at trial, and the Court is convinced that such ruling was proper in light of the law applicable to this case and the nature of the letter, [fol. 328] as well as its relevancy in this matter.

The Court has examined at length the authorities bearing upon the extent of the investigative powers of Congress. The extent of the power has been defined in authoritative decisions by the Supreme Court written after prolonged deliberation. There can be no doubt about the power of Congress, and its committees, to investigate as a necessary attribute of the duty and authority to legislate (McGrain v. Daugherty, 273 U. S.; Sinclair v. United States, 279 U. S.), and such investigative power has been characterized as being coextensive with the power to legislate, subject to the limitations imposed by the Fifth Amendment to the United States Constitution and the right of privacy in matters unrelated to a valid legislative purpose.

There is a complete want of precedent, we believe, for the proposition defendant urges, which in simplest terms would limit the powers of a duly authorized committee of the Congress in conducting an inquiry for a legitimate legislative purpose by permitting such committee, and hence Congress itself, to compel the attendance and testimony of only such witnesses as the courts might judicially determine were reasonably expected to be in possession of pertinent information.

The doctrine of separation of powers and a rightful regard for the authority of the legislative branch of the [fol. 329] Government, we believe, refutes a judicial eval-

uation of those matters which clearly are within the discretion of the Congress, which alone is responsible for the exercise of the authority from which the disputed power arises.

The established limitations upon the congressional investigative powers, which require a legislative purpose and inquiries pertinent thereto, provide ample protection, we believe, to the private affairs of witnesses appearing before duly authorized committees of the Congress. In this connection, we call attention to Barsky v. United States, by the Court of Appeals for the District of Columbia, reported in 167 F. 2d; Quinn v. United States, supra; Barenblatt v. United States, Circuit Court of Appeals for the District of Columbia, No. 13,327, decided January 3, 1957.

Beyond the fact that the Court does not find judicial power to determine what witnesses Congress may call in furtherance of its legislative purposes and compel pertinent testimony thereon, the record of this case discloses beyond any reasonable doubt that the subcommittee had information in its possession at the time defendant was initially summoned to appear before it which established a reasonable cause for requiring his testimony. The subcommittee had information, apart from the confidential letter, which indicated communist infiltration into the New York Typographical Union and elements of the New York newspapers, including the one by which the defendant was [fol. 330] employed.

In light of these facts, it was not only reasonable for the subcommittee to call the defendant and other employees from the press organization at which he worked, such a procedure by the subcommittee appeared expedient in furtherance of its express duties. I call attention in that connection to Watkins v. United States, 233 F. 2d, and Barsky v. United States, supra.

I might say at this point that I gave careful consideration to the contention that, because some members of the subcommittee felt so chagrined they didn't like the New York Times, that it was an attempt to investigate the New York Times rather than communist infiltration. But I

think the evidence clearly shows, by exchange of telegrams and by other inferences, that no one was contending that the New York Times was a communistic newspaper, the well-known newspaper that it is—exchange of telegrams, I believe, between the editor of the Times, or at least some official of the Times, and the committee specifically shows that, and, of course, if it was necessary, this Court would say he would give judicial notice to the fact that the New York Times is not a communistic newspaper. But that doesn't mean that because a newspaper isn't communistic that Congress doesn't have a right to investigate people who work for the newspapers.

The legislative purpose underlying the investigation and [fol. 331] studies committed by the Senate to the committee is concisely expressed by the enabling resolutions. Legislation in the field of foreign subversion and infiltration by subversives in this country is clearly within the congressional authority. See Barenblatt v. United States and Barsky v. United States.

The defendant's contention that the Government failed to establish that any precise question within the authority of the subcommittee was under inquiry at the time in issue is not established by the evidence in this case, and the Court contends no reasonable doubt to that fact. The statement of the chairman of the subcommittee at the commencement of the hearings in which the defendant appeared in Washington, D. C., and testified, clearly shows that the subcommittee was then engaged in attempting to ascertain the extent and nature of communist infiltration into news dispensing agencies. Such an inquiry is manifestly within the duties imposed upon the subcommittee by the enabling resolutions, and the authority of the subcommittee is measured by only the enabling resolutions creating it and charging it with specific duties. The scope of a given hearing by a duly authorized subcommittee must be confined to those matters fairly within the delegated authority; beyond that, the subcommittee is not confined to a categorical subject within the area delegated to it in pursuance of law. At least that is this Court's opinion and this [fol. 332] Court so held in the case of the United States v. Knowles.

The Court finds that the hearing in question dealt with the existence and extent of subversive infiltration in the news media and was within the authority of the subcommittee. The Court also finds beyond a reasonable doubt that defendant was fully aware of the precise subject under inquiry by the subcommittee at the time of his appearance before it in Washington, D. C., as evidenced by his own prepared statement objecting to the jurisdiction of the subcommittee.

Defendant's contention that the hearing before the subcommittee on January 6, 1956 was not shown to have been pursuant to the authority set out in the indictment, we think, is contrary to the evidence. The Government placed the pertinent resolutions and minutes in the record. These documents show the original authority of the Committee on the Judiciary from the United States Senate (Senate Resolution 366, 81st Congress, 2nd Session), the continuation of that committee's original authority to the time in question, and the authority of the subcommittee, as well as its composition, at the time in question. This evidence is adequate in all respects to show the authority of the subcommittee to act in the premises beyond a reasonable doubt.

The contention of the defendant that the hearing at [fol. 333] which he testified and from which the indictment arose was not in furtherance of a legislative purpose proceeds on the assumption that a failure to have a specific legislation in contemplation, or a failure to show that legislation was in fact enacted, establishes an absence of legislative purpose. This argument is patently unsound, we think. The investigative power of Congress is not subject to the limitation that hearings must result in legislation or recommendations for legislation. See: in re Chapman, 166 U.S. 661; Townsend v. United States, by the Circuit Court of Appeals, D. C.; also Barsky v. United States.

The evidence defendant introduced to support his contention that a non-legislative purpose prompted the subject hearings is wanting in probative value and wholly insufficient to cast a doubt upon the true congressional purpose underlying the delegation of the authority to the

subcommittee or the purpose of the subcommittee in conducting the hearings in question. Indeed, where the subcommittee proceeds within the authority lawfully delegated to it by Congress, it would appear doubtful that want of legislative purpose could be established. United States v. Josephson, 2nd Circuit, 165 F. 2d 82, and other authorities cited in the opinion.

The Court finds that the hearings in question were, beyond a reasonable doubt, conducted in furtherance of a legislative purpose and within an area subject to the legis-
[fol. 334] lative powers of the Congress.

The statute under which defendant is charged is said to be so vague and indefinite, when read in conjunction with the enabling resolutions defining the authority of the subcommittee, as to deprive a defendant appearing before the subcommittee of due process of law. The statute in question has been judicially construed in many cases; the meaning to be attached to the words appearing in the provision is clear. The statute itself is neither vague nor indefinite in its proscriptions and mandates.

Where a witness appearing before a committee of the Congress is fully apprised of the extent of the authority of the body, and is in fact fully apprised of the precise subject within the committee's authority which is then under inquiry, as was the defendant in this instant case, the duty of the witness is clear: Any question pertinent to the matter under inquiry must be answered, except insofar as the Fifth Amendment may provide justification for a refusal to answer. See United States v. Rosen, also Quinn v. United States. The contention of statutory vagueness is without merit.

The question which constitutes Count 3 of the indictment, the Court believes, is not pertinent to the subject established by the evidence to have been under inquiry at the time defendant testified. This count of the indictment, Count 3, therefore, will be dismissed. Upon the evi-
[fol. 335] dence adduced at trial, it is the judgment of the Court that the defendant is guilty as charged in Counts 1 and 2 of the indictment beyond a reasonable doubt. That verdict will be entered, present bond of the defendant will

be continued pending sentence, and the cause will be referred to the Probation Officer. I say to counsel that I would like, if possible, perhaps, to pronounce sentence, providing the Probation Officer is ready, a week from today, on the 25th. You will be notified. I take it that the defendant resides in New York.

Mr. Rauh: Yes, he does, Your Honor.

The Court: If we could notify you Wednesday, would that be ample time for the defendant?

Mr. Rauh: It certainly would.

Would you care to hear me on that subject today or next Friday?

The Court: I would prefer to hear you, Mr. Rauh, on the day that the defendant comes up for sentence.

Mr. Rauh: That is entirely satisfactory to us, if Your Honor please.

The Court: Yes, I prefer to hear you that day.

Mr. Rauh: And we should submit such information as we would care to to the Probation Officer?

The Court: Yes. I would suggest that maybe that would be possible today.

[fol. 336] Mr. Rauh: We will do that right now.

The Court: Yes, sir.

That will be all as far as this case is concerned.

(Whereupon, at 10:10 a. m., the trial proceedings in the above-entitled cause were adjourned.)

[fol. 337] Reporter's Certificate to foregoing transcript (omitted in printing).

[fols. 338-350] [File endorsement omitted]

[fol. 351]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[Title omitted]

Washington, D. C.

Transcript of Proceedings—Friday, January 25, 1957

The defendant in the above-entitled cause appeared for sentencing before the Honorable Ross Rizley, a District Court Judge, at 9:55 a. m.

[fol. 352]

Proceedings

The Clerk: United States v. Robert Shelton.

The Court: I think at the time I rendered the judgment in this case, Mr. Rauh, you said you would like to be heard at the time of sentence, and the Court will be very glad to hear you at this time.

Mr. Rauh: If Your Honor please, I filed a memorandum with Your Honor.

The Court: I have read your memorandum.

Mr. Rauh: I don't really care to repeat that. I know that Your Honor has examined our memoranda throughout this case very carefully. Even when you have not agreed with their contents, you have done us at least the honor of examining them carefully, and I am sure you have examined this carefully.

I would only say in summary of it, if Your Honor please, that this is a very young man, with an unblemished record. His employer is willing to give him a chance. I really think I could use the word "beg," when I say we urge you also, if Your Honor please, to give him a chance, with this young and unblemished record, and either, therefore, not to impose a jail sentence or, if Your Honor does feel called upon to impose one, that Your Honor places him

on probation and give him a chance which his record up to date, I believe, warrants.

[fol. 353] The Court: Does the District Attorney have any statement he wants to make in this case?

Mr. Hitz: We have no recommendation, Your Honor.

The Court: Very well.

Mr. Shelton, do you know of any legal reason why the Court should not pronounce sentence at this time?

The Defendant: No, Your Honor.

The Court: I have read the memoranda submitted by your counsel, also letters that have come from your employers and others recommending very strongly probation.

I want to say in that respect that during the brief tenure of this Court on the bench, we have employed very liberally the discretion that the Court has in respect to probation, and I personally think it should be used in permitted cases, especially where the defendant has a contrite heart, I might say, and an attitude of regret and a genuine awareness of the crime for which he has been convicted and a genuine desire for reformation and rehabilitation.

The Court has closely observed you during the progress of the trial, and I will say that so far as your personal demeanor before the committee of the Congress, you didn't display the contemptuous attitude that many in the same category do. On the other hand, the Court is doubtful if the factors that I have mentioned, which I think are things [fol. 354] that I should take into consideration in the question of probation—the Court is doubtful whether they actually exist in your case. In other words, I am not sure, but I doubt if the same circumstances should arise tomorrow—perhaps I should say it this way—I am inclined to believe that you would probably still defy the Congress.

Mr. Rauh: May I be heard, sir?

The Court: Yes, I will be glad to.

Mr. Rauh: I didn't want to add anything, and I certainly didn't want to interrupt, but there is a problem that I have discussed with Mr. Shelton over the period that I have known him, which is, of course, only a short period, and it relates to that problem, and I think I can—indeed, I thought it was conceivable that Your Honor might say what Your Honor has said in the form of a question, and

I have discussed with Mr. Shelton the answer that he would give under those circumstances. So I think I shall, if you will permit, ask the question and answer it, if I may, for Mr. Shelton here. It is something like this:

Your counsel put to the Judge the proposition that these matters had not been finally decided and that the question might arise differently if they had been finally decided. What would your position be under those circumstances? And Mr. Shelton and I had agreed that his answer to you would be that if the law required, after final decision, these [fol. 355] answers, that they would be forthcoming. In other words, I had more or less expected, in view of the statement that I had made as counsel, that the law still remained in some doubt, not in Your Honor's mind, I am quite clear, but in the review of this matter by the Supreme Court, and I, therefore, thought you might on the very ground of reformation put to him this question, and I think the answer would be as I have given it to you, sir.

The Court: Mr. Rauh, I want to say this to Mr. Shelton. I haven't observed in the trial of any case, I think, during this term here or terms elsewhere anyone that has been more active in behalf of his client's rights than have you. I shall certainly say, regardless of what may happen here, that he has been very ably defended.

Of course, I don't know, this Court might be reversed. They do reverse courts, so far as courts of appeals are concerned, which this Court, I think, is bound by law to give considerable weight and precedence to. In my own view, the crime has been committed; otherwise, I wouldn't have found him guilty.

Mr. Rauh: I didn't want my remarks to be interpreted to the contrary.

The Court: They are not. I understand it perfectly.

Of course, it is always a sad duty when the Court has [fol. 356] to sentence someone, but the Court has that responsibility. You ought to be commended here on the letters that have come in here on your behalf from your employers, but they don't ultimately, finally have the responsibility. I am the one that has the responsibility.

This threat of communism in this country, as I said a week ago, is one of the very disturbing things to this

Court, and the Court can take judicial notice of the fact that it is still going on. The press and the radio reports this morning matters that are very disturbing from the standpoint of communism and its threats to our republican form of Government, and in this case I do not feel that I can put you on probation.

JUDGMENT AND SENTENCE

And so it will be the judgment and sentence of this Court that on Count 1, of which you were convicted, that you pay a fine of $250 and to be sentenced to the custody of The Attorney General for a period of six months; and on Count 2, that you pay a fine of $250 and be sentenced to the custody of The Attorney General for six months. The six months' sentences, as far as the commitment to custody is concerned, will run concurrently. The fines will stand only as to the two counts. That will be all.

Mr. Rauh: Will Your Honor continue the bond pending appeal?

The Court: Yes, the bond will be continued pending— [fol. 357] I assume you will appeal, Mr. Rauh, and the bond will be continued. Of course, you will be required to put up a different bond when you appeal. The defendant will remain on the bond now standing.

Mr. Rauh: And he may be in our custody until he makes the new bond? I gather that for the next hour, he may be remanded to our custody while the new bond is being made up?

The Court: Oh, yes, that will be all right; yes, continue the bond, sure. That will be all.

(Whereupon, at 10:05 a. m., the proceedings in the above-entitled matter were adjourned.)

[fol. 358a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 359]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13737

ROBERT SHELTON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal From the United States District Court
for the District of Columbia

OPINION—Decided June 18, 1960

Mr. Joseph L. Rauh, Jr., with whom Mr. John Silard was on the brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom Messrs. Oliver Gasch, United States Attorney, Lewis Carroll and Harold D. Rhynedance, Jr., Assistant United States Attorneys, were on the brief, for appellee. Mr. John D. Lane, Assistant United States Attorney, also entered an appearance for appellee.

Before Washington, Bastian and Burger, Circuit Judges.

Burger, Circuit Judge: This is an appeal from conviction and judgment after trial in the District Court for contempt of Congress growing out of refusal to answer [fol. 360] questions asked by the Senate Internal Security Subcommittee.*

Shelton, a copy editor of a New York newspaper, was subpoenaed and appeared, first in executive session in

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* The circumstances under which the appeals in this case and seven other contempt of Congress cases came on for hearing in this court appear in footnote 2 of the opinion in No. 13464, Gojack v. United States, decided this day.

New York City on December 7, 1955, and later in open sessions of the Senate Internal Security Subcommittee in Washington, about a month later. At both hearings he refused to answer questions on the subject of membership in the Communist Party and as to whether he had ever had conversations with a certain named person identified by the Committee as a Communist. He was convicted for contempt on two counts for refusal to answer questions.[1] At Shelton's request he was tried without a jury.

The Subcommittee was operating under a Senate Resolution adopted in 1950,[2] and continued thereafter,[3] which empowered it to make a complete and continuing study and investigation of (1) the administration, operation and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection [fol. 361] of the internal security of the United States; and (3) the extent, nature and effect of subversive activities in the United States, including, but not limited to, espionage, sabotage, and infiltration by persons under the domination of the foreign government or organizations controlling the World Communist movement seeking the overthrow of the United States Government by force and violence.

Under this Resolution the Subcommittee had previously heard testimony from one Winston M. Burdett, a well known journalist, foreign correspondent and newscaster, who had been a member of the Communist Party from 1937 to the early 1940's. Burdett cooperated fully with the Subcommittee and gave information including names

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[1] These questions were:

(1) "Are you, sir, a member of the Communist Party, U.S.A.?"

(2) "Did you ever have any conversation with Matilda Landsman?"

[2] S. Res. 366, 81st Cong., 2d Sess. (1950).

[3] S. Res. 7, 82d Cong., 1st Sess. (1951); S. Res. 198, 82d Cong., 1st Sess. (1951); S. Res. 314, 82d Cong., 2d Sess. (1952); S. Res. 46, 83d Cong., 1st Sess. (1953); S. Res. 172, 83d Cong., 2d Sess. (1954); S. Res. 49, 84th Cong., 1st Sess. (1955); S. Res. 58, 84th Cong., 1st Sess. (1955); S. Res. 209, 84th Cong., 2d Sess. (1956); S. Res. 174, 84th Cong., 2d Sess. (1956).

of persons with whom he had worked; he did not refer to appellant. Later the hearings involved in this case were called as part of a program "to pursue every lead which developed out of the Burdett testimony."[4]

Some time before appellant was first subpoenaed to appear the Subcommittee had received a letter stating that one "Shelton" who worked for the New York Times was informed about if not active in a "Communist Group" and knew of the Communist Party activities in newspapers. The author of the letter was not identified in the record but there was testimony that he was known to the Subcommittee as a source of reliable information on other occasions. Thereafter a subpoena was issued addressed to "Willard Shelton." In attempting to make service the process server learned that there was no "Willard" Shelton employed by the New York Times, but that a "Robert" Shelton was employed as a news copy editor. The Subcommittee then authorized amendment of the subpoena to add the words "or Robert Shelton," and it was served on Robert Shelton, appellant here.

[fol. 362] The record indicates that at the outset of appellant's appearance before the executive session, the Subcommittee was uncertain whether appellant was indeed the person they thought to be in possession of information about Communist Party activities in newspapers generally or in his own newspaper. He was interrogated as to his background in order to clear up the question of identity, and in the course of that interrogation was asked and refused to answer substantially the questions set out in the margin, footnote 1. He was recalled 30 days later when the Subcommittee was holding public sessions.

At the opening of the public hearings in Washington on January 4, 1956, the Chairman pointed up the purpose of the inquiry, stating that the Subcommittee "could not be unmindful . . . that among the persons involved in this investigation have been many who were or are mem-

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[4] Hearings before the Senate Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, 84th Cong., 2d Sess., pt. 17, at 1587 (1956).

bers of the press, and that the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration."[5] Early in the hearing Senator Hennings, a member of the Subcommittee, stated:

> . . . that it be generally known and understood that this is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press.[6]

The Subcommittee thus defined the general area of this series of hearings.

Immediately before appellant was called to the stand at the January 6 session, Senator Hennings also commented in part:

> [fol. 363] I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication. . . .
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>
> . . . And I do think in the interest of justice and in the interests of preserving the integrity and the high standing of this committee, we should be particularly cautious and aware of the possibility of unnecessarily calling one before us who may have nothing to add to the general subject matter of our inquiry and who may be seriously damaged in his own personal and professional life.[7]

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[5] *Ibid.*

[6] *Id.* at 1588.

[7] *Id.* at 1718-19.

The Chairman at the same time referred to a telegram from the Long Island Press asking the Subcommittee to do what it could to emphasize that it had led in efforts to expose Communist infiltration of the press and that it was supporting the Subcommittee's work. The Chairman commented: "The committee is not investigating the Long Island Press or any other newspaper. We are aware of the fact that the Long Island Press was alert to the danger of the Communist infiltration from a very early date and was aggressive and effective in combating this danger in its own organization."[8] Upon being called to take the stand at this point appellant challenged the Subcommittee's power to call him as a witness.

Shelton was then asked the questions set forth in the indictment and he refused to answer. He was duly cited for contempt for his refusal and upon being tried was found guilty as charged. Appellant did not rely on the Fifth Amendment to the Constitution as a reason for his refusal to answer questions.

Appellant urges numerous errors in the proceeding below. Briefly stated, they are:

[fol. 364] (1) That Part 3 of Senate Resolution 366 is too vague and imprecise to authorize or permit the Subcommittee to compel answers.

(2) That appellant could fairly refuse to answer the questions since he was not told the "subject under inquiry," as required.

(3) That the pertinency of the questions to the subject matter was not explained.

(4) That the very nature of the questions violated appellant's First Amendment rights.

(5) That the indictment was faulty in failing to set out the "question under inquiry."

(6) That appellant need not answer any questions as the Subcommittee did not have "probable cause" to call him.

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[8] *Id.* at 1718.

(1) The challenge to Senate Resolution 366, Part 3, as too vague to authorize the Subcommittee to compel answers to any questions must fall for several reasons. The Resolution as a whole and Part 3 in particular is more explicit than the House Resolution sustained by the Supreme Court in *Barenblatt* v. *United States*, 360 U.S. 109 (1959). The criticism of vagueness seemingly directed at the House Resolution in *Watkins* v. *United States*, 354 U.S. 178 (1957), does not in any event apply to Senate Resolution 366. In the recent *Barenblatt* case the Supreme Court confirmed the power of Congress to investigate activities of this character. Since its creation the Subcommittee has devoted itself to investigating subversive activities and Communist infiltration in many phases of American life, including infiltration in key industries, in television, radio and the press. Congressional awareness and approval of the work of the Committee can be found in numerous reports to the Congress by the parent Committee, and in repeated appropriations for its work.[9] In one report to the Senate the Committee specifically referred to the so-called "Burdett hearings" and other sessions in New York, relating to Communist efforts to [fol. 365] infiltrate newspapers.[10] Whatever may have been argued at one time as to possible infirmities or vagueness in Resolution 366 under which the Committee was acting, the *Barenblatt* case and the legislative gloss attached to the Resolution has put this issue to rest.

(2) Appellant contends he was not informed of the subject or topic under inquiry and hence could not fairly decide whether he could be compelled to answer. The record discloses that at the opening of the hearings the investigation was expressly described as directed at the efforts and activities of the "international Communist conspiracy" to influence American public opinion through the press. Senator Hennings also stated the hearings

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[9] See note 3, *supra*.

[10] Report of the Subcommittee on Internal Security to the Committee on the Judiciary for 1955, S. Rep. No. 1385, 84th Cong., 2d Sess., at 4 (1956).

were for the purpose of showing "such participation and such attempt as may be disclosed on the part of the Communist Party . . . to influence or to subvert the American press." [11] In a colloquy with the Chairman only moments before appellant took the stand, Senator Hennings restated the same idea in these words "this committee has the right to inquire into all efforts, or indeed all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication." [12] Thus the subject matter was explained with the required clarity so that appellant could fairly evaluate the risks of refusing to answer. That the explanations given by the Chairman and Senator Hennings varied in terms did not in any way impair the clarity of the explanation. The broad subject matter of Communist Party infiltration and subversion, the narrower subject of efforts to influence American public opinion and the specific effort to use the press to implement these objectives were spelled out [fol. 366] with utmost clarity not only in the remarks of the Subcommittee member but also in the context of the hearings. In the course of the hearings to pursue the "Burdett testimony" 18 persons connected with communications media were called.[13] The interrogation of these witnesses was directed at Communist activities in the press and communications field generally.

Moreover appellant's statement of objections to being questioned and his responses reveal his complete awareness of the subject matter of the inquiry. A great part of the statement[14] is concerned with the dangerous con-

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[11] See note 6, *supra*.

[12] See note 7, *supra*.

[13] Six news reporters, one newspaper indexer, one motion picture exhibitor, an ex-bookseller, one newspaper proofreader, one magazine editor, two linotype operators, one copy editor, two news copyreaders, one ex-journalism professor, one newspaper education editor.

[14] "The question also threatens freedom of the press as guaranteed by the first amendment. I believe no other governmental body in the free world would call a newspaperman and demand to know his political beliefs and associations. However unknowingly or

[fol. 367] sequences which the Committee's investigation would have on the freedom of the press. There is no difficulty in discerning his belief that a newspaperman should be immune from questions of the kind he refused to answer.

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unwittingly, gentlemen, in the quest for internal security, you are threatening long-standing and hard-won American liberties. The Supreme Court has held that—

"• • • the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate • • •"

A body is the sum of its organs, a machine the sum of its parts. An attack on the smallest component of a body or machine is an attack on the whole. An invasion of my individual rights is an invasion of the rights of the paper that employs me and an invasion of the rights of the newspaper profession as a whole. This subcommittee is nudging the end of my copy pencil, it is peeking over my shoulder as I work. This subcommittee is engendering the fear that soon it will be looking into newsrooms all over the country.

If, as a result of my being called here, I am put under mental pressure to change one word or one sentence in material that I edit, an abridgment of freedom of the press will have taken place. Demanding to know what is going on in the mind of a newspaperman without inhibiting a free press is impossible. Your question acts as a form of 'prior restraint' on publishing, telling newspaper executives who should or who should not be on their staffs.

A journalist's credo I wholeheartedly support is 'to give the news impartially, without fear or favor, regardless of any party, sect, or interest involved. • • •' But by being called before you to answer about my political beliefs and associations I am placed in fear of having my loyalty considered suspect if I do not, while freely exercising my sound conscience, answer this committee's questions. I am obliged to seek your favor to guard my personal integrity, and that of the paper for which I work. . . .

• • • • • • •

Let, me, in complete sincerity, cooperate with you by saying this: One of the greatest contributions that can be made toward the internal security of the United States would be to promote the maintenance of a press that is free and unfettered and unafraid; a press and newspapermen that will criticize what they please and support what they please. It is a rightful role of the press to be a watchdog over government. It is not a rightful role of government to be a watchdog over the press. Let the reader at his breakfast table be the judge of whether a paper suits him or not, and by extension, whether the men who produce that paper suit him." S. REP. No. 1934, 84th Cong., 2d Sess., 15, 16 (1956).

While he was firm and clear in arguing that the questions were beyond the scope of the Committee's authority and that he was protected from inquiry by the First Amendment, he at no time asserted that the subject matter of the inquiry was too vague. Apart from the demonstrated clarity of the topic, we note that appellant sought no explanation of subject matter as he was entitled to do.

Significantly, here, as in the *Barenblatt* case, appellant's [fol. 368] refusal to answer related to his own Communist Party affiliation, rather than the activities or membership of others. As in *Barenblatt*, the Subcommittee had a right to know if the witness was a member of the Communist Party, for that identification rendered more meaningful any testimony given by him concerning his own activities or concerning the presence or absence of Communist Party efforts to infiltrate the press. An inquiry into a possible conspiracy for infiltration or subversion of the press embraces the right to command the witness to say whether he is a member of the conspiracy, subject, of course, to the right of the witness to take refuge in the Fifth Amendment. *Barsky* v. *United States*, 83 U.S.App.D.C. 127, 167 F.2d 241, *cert. denied*, 334 U.S. 843 (1948).

We find no substance in the contention that appellant was not aware of the topic and subject under inquiry.

(3) While appellant challenged the Subcommittee's authority, he did not, as we have noted, ask that the subject be stated. Nor did he object to the questions on the grounds of pertinency. In response to a challenge to the authority of the Subcommittee the Chairman advised appellant that the questions were directed at whether he was a part of the Communist conspiracy[15] then under investigation. The second count question involved whether he had any knowledge as to a Communist attempt to infiltrate Typographical Union No. 6, and whether he had ever discussed with Matilda Landsman the question of Communist activity in that union. Matilda Landsman was known to the Subcommittee as an employee of the New York Times who had, on directions of the Communist Party "downgraded" her job from news work to the

[15] See Barsky v. United States, 83 U.S.App.D.C. 127, 167 F.2d 241, *cert. denied*, 334 U.S. 843 (1948).

press room in order to carry out "missionary" or "colonizing" work in the typographical employees. We hold that the pertinency of the questions was revealed by their con- [fol. 369] text and that no additional explanation of pertinency was called for absent an objection to the question on that ground. No particular form or words are required to raise that objection but the interrogators must in some way be made aware that the witness objects to or is in doubt about the relationship of the question to the subject under inquiry. Appellant failed to do this, hence there was no duty on the Subcommittee to say more.[16]

Moreover the *Watkins'* standard on this score is qualified:

> *Unless* the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, *upon objection* of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. (Emphasis added.) 354 U.S. at 214-15.

This definition makes plain that if the subject matter has been made clear no explanation need be given, absent objection or request. In other words, *two* things must coincide to require an explanation as to pertinency: (1) that the subject matter be *unclear,* and (2) the witness must object.

(4) Essentially appellant argues that as a newspaperman he has a special immunity from questions as to possible membership in the Communist Party. He argues that this investigation was directed at his newspaper to discourage all "newspapers from hiring persons of unpopular, unorthodox or minority views and associations . . . ." This, it is argued, results in "elimination of persons from the press who hold or once held unorthodox, unpopular

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[16] We note in passing that with respect to certain questions at both the executive and public sessions appellant frequently made objections explicitly on pertinency grounds. See S. Rep. No. 1934, *supra* note 14, at 4, 8, 13, 18. None of these questions formed the basis of his conviction.

or minority views or associations [and] is as effective a [fol. 370] form of censorship as the deletion of the material they contribute to the press." Appellant's Brief, p. 32. This First Amendment argument is, in large part, that any inquiry such as this, directed to a member of the press is an impairment of the freedom of the press because it tends to intimidate all those engaged in that activity. But this inquiry was in no sense an investigation into the press as such, but into the question whether the constitutionally guaranteed freedom of the press was being used to undermine that very freedom and the foundation on which it rests. *Barenblatt* authorizes such inquiry. The investigatory power of Congress flows from the right of the government to preserve itself and its institutions. The important right of the press to be free and independent is not impaired by an inquiry into possible abuse of the right which is directed at destroying the very freedom the First Amendment assures. Indeed in the *Barenblatt* opinion in response to a similar argument the Court sharply pointed out that "investigatory power in this domain is not to be denied Congress solely because the field of education is involved." 360 U.S. at 129. Similarly, appellant's profession as a newspaperman does not preclude inquiry into his activities as a possible member or in behalf of the Communist Party. See *Barsky* v. *United States, supra.* Inquiry into generally protected areas must be subject to careful judicial scrutiny but the rights are not protected absolutely and they must yield to the superior right of Congress to know whether there is a dangerous abuse of those rights.

(5) Appellant urges that his conviction must be reversed because the indictment did not specifically recite the "question under inquiry." No authority has been cited which suggests that Rule 7(c), FED. R. CRIM. P., requires an indictment under the statute to recite details of the authority and scope of inquiry.[17]

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[17] Sacher v. United States, 102 U.S.App.D.C. 264, 267, 252 F.2d 828, 831 (1958), held that an indictment under this statute need not "recite details of the authority and scope of the inquiry" and that holding stands undisturbed by the Supreme Court's action in Sacher v. United States, 356 U.S. 576 (1958).

[fol. 371] (6) Finally, appellant challenges the Subcommittee's subpoena power. The essence of this attack is that the subpoena under which appellant testified was invalid because the Committee had no reason to call appellant. This argument by its terms rests on the theory that in order to call appellant the Committee must show it had reason to believe he was or had been affiliated with or had information about Communists. Information about Communists is not the exclusive property of Communists. Many persons innocent of Communist Party connections and bitterly hostile to Communism may possess important information about such activities. Hence a belief or showing that the Committee must have reason to believe the witness is or once was a Communist or in sympathy with them is unnecessary. The second phase goes to the argument that a legislative committee has no power to employ compulsory process without some reason to believe the witness has information about the subject under inquiry. There is relatively little authority on this general subject but *United States* v. *Orman*, 207 F.2d 148, 154-5 (3d Cir. 1953), suggests that congressional committees may not subpoena private citizens at random "indiscriminately in the mere hope of stumbling upon valuable information and to cite them for contempt if they refuse to answer. . . . " The Supreme Court in *Barenblatt* noted the absence of evidence "that the Subcommittee was attempting to pillory witnesses," and absence of evidence that "petitioner's appearance as a witness follow[ed] from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee." 360 U.S. at 134.

A careful review of this record satisfies us that the authority of the Subcommittee to conduct the hearings is plain, that there was full awareness on the part of the [fol. 372] appellant that the subject matter was the possible infiltration of Communists into the radio, TV, and the press, including his own paper and that the questions were plainly pertinent to the topic. There is not the slightest indication in this record of an effort or desire or a tendency to pillory the appellant or other newspapermen or

to call them indiscriminately without reason. After the important revelations of Winston M. Burdett, it was surely not a "dragnet" process to call appellant as a member of the working press to check on possible Communist Party activities among his fellow employees. The proper balance between individual rights and the broad public interests at stake here must be resolved in favor of the latter.

Other errors assigned by appellant have been carefully considered but we find no error which warrants reversal.

Affirmed.

[fol. 373]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Criminal 1215-56

No. 13737

ROBERT SHELTON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal From the United States District Court for the District of Columbia

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Before: Washington, Bastian and Burger, Circuit Judges.

JUDGMENT—June 18, 1960

This Cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideration Whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Burger.

[fol. 375] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 376]

SUPREME COURT OF THE UNITED STATES

No. 246, October Term, 1960

ROBERT SHELTON, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—March 27, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

ROBERT SHELTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No.

ROBERT SHELTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Robert Shelton, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

Opinions Below

The opinion of the District Court is reported at 148 F. Supp. 926. The opinion of the Court of Appeals has not yet been reported. Both opinions are printed in Appendix A, *infra*, pp. 32 to 56.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 18, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

Questions Presented

Petitioner, a copy editor on the New York Times, refused to answer certain questions at a hearing of the Internal Security Subcommittee of the Senate Judiciary Committee, for which refusal he was convicted of contempt under 2 U.S.C. § 192, fined, and sentenced to six months imprisonment. The questions presented in this case are:

1. May a witness subpoenaed by the Internal Security Subcommittee without probable cause or any reason to believe that he has ever been affiliated with, or has any information about, Communists or Communism, be convicted of contempt for failing to answer questions on that subject?

2. Was petitioner adequately apprised of the "question under inquiry", to determine whether he was within his rights in refusing to answer the Committee's questions?

3. May petitioner, a newspaperman, properly be convicted of contempt for refusing in the Internal Security Subcommittee's New York Times hearing to answer questions which infringed upon the freedom of the press?

4. Is an indictment which fails to set forth the "question under inquiry", sufficient under the Sixth Amendment to charge the offense of contempt under 2 U.S.C. § 192?

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[1] Under the statute and rules of this Court, this petition was required to be filed on July 18. Pursuant to order of Mr. Justice Frankfurter dated July 18, Rule 21.1 was waived; a single copy of corrected page proof was filed on July 18 and the full 40 printed copies of the petition were filed on July 20.

5. Is a defendant entitled to a dismissal of an indictment or a preliminary hearing thereon when he alleges by motion and affidavit that less than twelve jurors on the grand jury which indicted him were able to exercise an independent judgment by reason of the fear engendered by operation of the government employees security programs, a fear which amounted to actual bias and prejudice against him?

6. May a court separately convict and sentence a witness for contempt for refusing to answer two questions before a Congressional Committee, both falling in the generally defined area within which he has refused to testify?

Statutes and Constitutional Provisions Involved

The pertinent constitutional and statutory provisions in this case are set forth in Appendix B, *infra*, pp. 57 to 58.

Statement

In June of 1955 in the course of hearings on "Strategy and Tactics of World Communism", Winston Burdett, a radio commentator, testified before the Internal Security Subcommittee of the Senate Judiciary Committee (Tr. 83).[2] Burdett revealed that he had been a Communist Party member in the late 1930s and early 1940s while employed by the Brooklyn Eagle, and had engaged in Communist activities at home and abroad. He named a number of persons as former fellow Communists on the Brooklyn Eagle and the Newspaper Guild; those he named were then called and questioned by the Committee.

Subsequently, a new series of hearings was instituted involving New York newspapers, particularly the New York Times. In December, 1955, thirty-eight witnesses

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[2] All "Tr." references in this brief refer to the pagination of the reporter's transcript of trial proceedings.

(30 of them from the New York Times) were questioned in an executive session in New York City (Tr. 207-10). On January 4, 1956, the Committee commenced a public hearing which, although described by its Chairman as a "subsequent chapter to the Burdett testimony" (Tr. 84), was essentially an investigation into Communism on the New York Times or among its employees; of eighteen witnesses called in the hearings, fifteen were persons employed, formerly employed or otherwise connected with the New York Times (Tr. 212-14).[3]

It has never been clarified just how and by whom the New York Times hearing was called. The Committee had never met to authorize the January, 1956 Times hearing, although Rule 1 of the Committee's Rules states "No major investigation shall be initiated without approval of a majority of the subcommittee" (Tr. 197).[4] At the opening of the January, 1956 hearing, Senator Hennings, a Committee member, disclosed that there had been no prior Committee authorization, stating (Tr. 86): "I would like to have the position of the committee, if it be the position of the majority of this committee, since the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings," and that "we

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[3] The Committee's hostility to the Times was evidenced by its publication, about a week before the Times hearings began, of a Report entitled, "Strategy and Tactics of World Communism, [Subtitle] Significance of the Matusow Case" in which it republished an old Harvey Matusow allegation that there were "well over one hundred" dues-paying Communist Party Members on the New York Times. In a footnote (at p. 28), the Committee Report mentioned a 1953 Matusow affidavit of recantation, but omitted the paragraph of that affidavit in which Matusow revealed the falsity of his earlier statement that he had known "well over one hundred" Communists among Times employees (Tr. 233-44, 289).

[4] Not only did Counsel Sourwine confirm this at the trial, he also revealed that he knows of *no* occasion since its adoption on which the Committee has ever given previous authorization for any of its hearings (Tr. 199-200).

have no list of prospective witnesses, nor has any offer of proof as to what their testimony is likely to be been given to this subcommittee. . ." (Tr. 93).

Nor has it ever been clarified how the Times witnesses came before the Committee; indeed, it is unclear whether the witnesses had actually been subpoenaed by the Committee or by Counsel Sourwine. The Times hearings were apparently conceived by Sourwine in November, 1955 (see Tr. 144-47). But on the witness stand Mr. Sourwine declined (Tr. 140-43) either to admit or deny the truth of a report by James Reston in the New York Times of January 6, 1956 (Tr. 141), to the effect that:

> "When more than fifty subpoenas were issued to people in the press, radio and other fields of communication on behalf of the committee last November, Mr. Sourwine was the only person who seemed to know any thing about them. They were issued under the name of Senator Eastland, but when this reporter called the Senator about them, he said he did not know they had been issued, did not know the hearings had been called, and said he would have to call Mr. Sourwine to find out the facts."

A. *Petitioner's Committee Appearance*

On November 14, 1955, a Committee aide arrived at the New York Times with approximately thirty subpoenas for Times employees. While none of the subpoenas was addressed to petitioner, one of them was made out to a "Willard Shelton", a nationally known columnist (Tr. 168). On discovering that Willard Shelton was not employed by the Times, the Committee aide made inquiry at the Times and was informed that there were "several" Sheltons employed at the Times, including petitioner, Robert Shelton,

employed on the "news side" (Tr. 165-173; 177-180). This information that there was no Willard Shelton on the Times but that there were several Sheltons there, including one on the news side, was communicated to Chairman Eastland through Counsel Sourwine. After some discussion of the problem, Chairman Eastland told Counsel Sourwine, according to the testimony of the latter (Tr. 144-145), "Well, go ahead and tell him to come." Thereupon, on instructions from Sourwine, the Committee employee added the words "or Robert Shelton" to the subpoena, and served it on petitioner (Tr. 145, 168). A new subpoena in petitioner's name alone was subsequently issued on November 23, 1955 and served on petitioner.

On December 7, 1955, petitioner appeared pursuant to the revised subpoena at an executive session of the Subcommittee in New York. He inquired why he had been called, and was told that the Committee was "clearing up a question of identity" (Tr. 50-51). Interrogated on a number of subjects, he answered some of the Committee's questions, but then refused to answer others (Tr. 47-73). When petitioner first indicated that he would refuse to answer certain of the Committee's questions relating to Communist associations or personal political matters, Counsel Sourwine said (Tr. 58-59):

> "I will state, Mr. Chairman, I am greatly surprised. I did not expect this. We came into this as I explained to the Senators and to put on the record to clear up a question of identity. *The record will show that the witness was not charged with being a Communist.* Counsel said you are not a Communist and you never have been; isn't that right?
>
> "Mr. Fraenkel. Obviously that involves——

"Mr. Sourwine. The question does, of course, involve the answer, but I must admit to the chairman, I am taken by surprise.

"It may be that we shall have to question this witness more at length later."

Petitioner was recalled under the subpoena at the January 1956 public hearings of the Committee (see Tr. 75, 128). Petitioner made objection, prior to being sworn, that: "I fail to see why I am involved in this hearing" (Tr. 105) and subsequently stated (Tr. 114-115):

"I am involved in these hearings as a victim of accident. The subpoena first served to me was originally made out in the name of a person who does not work on my paper. A committee aide, when told that there was no such person on the Times, insisted on knowing if there was anyone with a similar name employed there. There were a few, but the only one that interested your man was the sole similar name in the news department—mine. At the executive hearings the committee counsel tried without success to link me with a certain New York newspaper. He was unable to establish any connection because I never worked for the paper under discussion. Yet I have been called back here today."

No response was made to petitioner's question, and he was sworn on the insistence of the Committee counsel (Tr. 106). He then freely answered a number of questions about himself, but refused to answer certain other questions inquiring into possible Communist associations and conversations with other persons, principally on the grounds that there was no justification for his having been called by the Committee, that the questioning was beyond the Commit-

tee's jurisdiction and violated his First Amendment rights (Tr. 106-128).

B. *The Procedings Below*

Following a Senate contempt citation, on November 26, 1956, petitioner was indicted on three counts under 2 U.S.C. § 192.[5] He was charged with refusal to answer the following three questions at the 1956 Committee hearing (J.A. 7-8): (1) "Are you, sir, a member of the Communist Party, U.S.A.?"; (2) "Did you ever have any conversation with Matilda Landsman?"; and (3) "What did you tell them (your employers)?"

The trial in the District Court commenced on January 14, 1957. The two principal issues at the trial concerned (a) the presence or absence of probable cause for the Committee's calling and interrogation of petitioner, and (b) whether the "question under inquiry" before the Committee had been made sufficiently luminous to petitioner at the time of his interrogation. We consider in order the facts as they emerged at the trial on these issues, which relate a most irresponsible episode in Congressional Committee investigatory procedure.

The Issue of Probable Cause

At the commencement of petitioner's trial, his counsel stated that the major factual issue at trial would concern "probable cause" for the Committee's calling and question-

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[5] Petitioner timely moved (J. A. 8) that the indictment be dismissed or that he be granted a preliminary hearing on the question of the fear and bias of the government employee grand jurors in a case involving allegations of Communist associations. Petitioner supported this motion with an affidavit like that involved in the *Watkins* case, 354 U.S. 178, setting forth facts showing that federal employees were questioned under the Federal Employees Security Program about their opinions concerning *Hiss, Coplon, Dennis,* and other such cases. The motion to dismiss or for a preliminary hearing was denied (J. A. 5).

ing of petitioner (Tr. 25-27, 37). Counsel asserted that at the time the Committee called petitioner it "had no information whatever about him", and that petitioner had been called "without any evidence that this was a man who had been in any way concerned with the communist movement or knew anything about it. . . . he was called before the committee, without any prima facie case or probable cause" (Tr. 25). Prosecuting attorney Hitz thereupon joined issue by asserting that no probable cause is required for a Congressional committee to subpoena anyone at all to inquire into his possible Communist affiliations. Mr. Hitz flatly affirmed that *"a man off the street could be called off the street and asked, 'Are you one of the persons that we have a duty to protect this country from?'"* (Tr. 32).[6] However, Mr. Hitz announced that he would not rely *solely* upon the proposition that no probable cause is required to haul a witness before a Congressional committee and inquire into his possible Communist associations; he offered to demonstrate that the Committee actually possessed information when it called petitioner that he had relevant information on the subject of its inquiry (Tr. 33-36). Accordingly, the prosecution sought to produce evidence

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[6] Mr. Hitz stated (Tr. 32; see also Tr. 164):

". . . any question that is pertinent to that subject [S. Res. 366] could be asked of anyone at all, even the most innocent person, as it developed or as it started, and could be asked of anybody whose identity was even unknown to the committee. I may say, to use the language of Mr. Rauh, that a man off the street could be called off the street and asked, 'Are you one of the persons that we have a duty to protect this country from?' and if the person was, he should either answer or make a refusal to answer based upon some legal justification.

Now, we say that only with respect to a pertinent question. We don't think that a person off the street could be called in and asked, 'What are your political beliefs?' But we think that there is no reason why anyone couldn't be asked, 'Are you a member of the Communist Party?' and 'Tell us what you know about it.'"

of "probable cause" for the calling and questioning of petitioner.

The sole evidence along this line was provided by Counsel Sourwine. Although Sourwine had stated in the 1955 Committee hearing (Tr. 58) "the record will show that the witness [petitioner] was not charged with being a Communist", he now testified that information had previously been received by the Committee linking a "Shelton" on the Times with a Communist group on the Times (Tr. 44-46). According to witness Sourwine, some months before petitioner was called, a letter (signed by a pseudonym) was received from a "reliable" informant, stating that a "Shelton" on the news side of the New York Times "was a member of a Communist group on the Times", who "would be or should be in a position to give the committee information about the activities of that group" (Tr. 131-32). Though no first name for "Shelton" was given in the alleged anonymous letter, a Committee subpoena had then been issued for "Willard Shelton" at the Times (Tr. 46). Sourwine was unable to reveal how, in fact, the name "Willard Shelton" had been put on the Committee subpoena, when Willard Shelton had never been identified as a potential witness. Mr. Sourwine only volunteered a "surmise" (Tr. 139) that

> "Somebody in the typing section at some point, having the name Shelton and not having the first name, asked somebody else, 'What is this fellow Shelton's first name?' Somebody else said, 'What, what Shelton?' He said, 'The newspaperman Shelton.' And somebody who knew that there was a newspaperman named Willard Shelton said, 'Willard'."

Despite the fact that petitioner had made clear that probable cause was to be the major factual issue at the trial, Sourwine disclosed that he actually had not seen the alleged

anonymous letter for over a year before the trial (Tr. 268), nor bothered to examine it while preparing his testimony (Tr. 132-3). Moreover, cross-examination revealed that the identity of the "reliable" informant was unknown either to Sourwine or the Committee (Tr. 136-37); Sourwine purported to have identified the "reliable informant" as the author of the letter concerning "a Shelton" because of its resemblance to other letters from the same informant in its "typing" and its "tone" (Tr. 138-9). Sourwine then revealed that the purported letter also included the names of some 17 or 18 other persons identified by the anonymous informant (Tr. 249); however, the only one of the 17 or 18 names Sourwine could remember was that of "Shelton" (Tr. 270-4, 277, 287). Finally, when pressed further as to the contents of the alleged letter, whose "typing" and "tone" he earlier recalled, Sourwine conceded, "I have no actual independent memory of this particular letter as a sheet of paper and what was on it" (Tr. 270) and asserted that there had been a whole series of letters from the anonymous informant, but all Sourwine could recall was that one of them had mentioned a Shelton at the Times (Tr. 270-274).

At all stages of the trial the Government vigorously and vehemently opposed defense efforts to produce the supposed anonymous letter about which the Government had elicited the testimony of witness Sourwine. Prior to the trial, petitioner had subpoenaed Committee records to prove that there was absolutely no information concerning petitioner in the Committee files and that it had called him without probable cause. The Government vigorously opposed the subpoena and it was quashed by the Court at the outset of the trial as too broad (Tr. 8-30).[7] After testimony by Mr.

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[7] While the Court viewed the subpoena as too broad in asking for any material in the Committee files at the time of petitioner's questioning

Sourwine about the alleged anonymous informant's letter, petitioner moved repeatedly for the production of that letter (Tr. 134, 162-3, 244, 263) to prove that Sourwine's improbable and contradictory testimony as to its contents was false, that no such letter ever existed (Tr. 202, 283), and that the Government's "probable cause" contention was thus a fabrication. Sourwine, however, asserted that he would not produce the anonymous letter because it was "confidential" (Tr. 163, 312).

The Trial Judge was thus put in a difficult position, for he was aware (see Tr. 16-21) that he could not permit the Government to rely for its showing of "probable cause" on a document withheld from the defense.[8] The Court first sought to avoid the necessity of ordering production of the "letter" by a preliminary ruling that probable

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bearing upon him, this was, of course, the only way to prove the negative fact that no such material existed. The breadth of the subpoena would hardly have subjected the Government to any burdensome production process, for subsequent Government testimony revealed that the only alleged material available to the Committee was a single "letter."

[8] See, e.g., *United States* v. *Coplon*, 185 F. 2d 629, cert. denied, 342 U.S. 920. It is also clear that on a challenge to the existence of probable cause, the so-called "informant's privilege" is inapplicable. *Roviaro* v. *United States*, 353 U.S. 53, 60-61. As the California Supreme Court recently emphasized (*Priestly* v. *Superior Court*, 50 Cal. 2d 812, —— P. 2d ——):

> ". . . only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue."

The problem created by the Government's attempt to rely upon what the Committee refused to divulge, was conceded by prosecuting attorney Hitz (Tr. 312):

> ". . . there is a technical problem arising within the confines of this courtroom . . . It has to do with the right of the defendant, as he asserts it, to further examine the witness Sourwine upon a document that we say procedurally, and as a matter of comity with another branch of the Government, and for reasons of national security, we preferred not to produce in court."

cause to call petitioner to the 1956 hearing was provided not by any "letter", but by petitioner's refusal in the 1955 executive session to answer certain of the Committee's questions (Tr. 264-267). Thereupon petitioner submitted a memorandum to the Court (see Tr. 307, 314) pointing out that the decisions of this Court prevent the fruits of an illegal search or seizure from being relied upon as probable cause for a subsequent search or seizure (*Nardone* v. *United States*, 308 U.S. 338; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385)—that if there had been no probable cause to call and question petitioner at the 1955 hearing, his refusal there to answer certain questions could not constitute "probable cause" for calling and questioning him at the 1956 hearing.[9]

The Trial Judge was apparently persuaded by this view, for in rendering his opinion, he avoided relying for probable cause either upon the "anonymous letter" withheld at trial, or upon petitioner's refusal to answer questions at the 1955 session. Instead, the Court ruled that *probable cause for the exercise of a Congressional Committee's subpoena power to compel disclosure is not an issue cognizable by the courts in a subsequent contempt prosecution* (see *infra*, p. 40):

> "There is a complete want of precedent for the proposition defendant urges, which in simplest terms would limit the powers of a duly authorized committee of the Congress, in conducting an inquiry for a legitimate legislative purpose, by permitting such committee,

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[9] It is also unclear on what theory petitioner's refusal at the December, 1955, hearing to answer Committee questions, on First Amendment and jurisdictional grounds, could, either as a matter of law or of fact, give the Committee grounds for belief that he possessed pertinent information. *Cf.* Pollitt, "Survey of Fifth Amendment Pleaders," 106 U. Pa. L. Rev. 1117 (1958), for a documented analysis of the question whether those who plead the Fifth Amendment privilege before the committees are in fact "guilty".

> and hence Congress itself, to compel the attendance and testimony of only such witnesses as the Courts might judicially determine were 'reasonably expected to be in possession of pertinent information'. The doctrine of 'separation of powers' and a rightful regard for the authority of the legislative branch of government refutes a judicial evaluation of those matters which clearly are within the discretion of the Congress which alone is responsible for the exercise of the authority from which the disputed power arises."

The District Court thus sought to obviate the "probable cause" issue by flatly holding that probable cause to call and question a witness before a Congressional committee is not required. As an afterthought, the opinion weakly suggested that probable cause to question petitioner might be found in a different factor (one never suggested by the Committee, by witness Sourwine or the prosecution)—the Subcommittee's information of "Communist infiltration into . . . elements of the New York newspapers, including the one by which defendant was employed" (*infra*, p. 40).

The Court of Appeals opinion leaves unclear whether it shared the view of the District Court that the Fourth Amendment is inapplicable to Congressional subpoena power. The Court quoted with approval from *United States* v. *Orman*, 207 F. 2d 148, 154-5 (3d Cir. 1953), a case in which "dragnet" Congressional examination of private citizens was held impermissible; however, the Court then sought to dispose of the probable cause issue in a single sentence of its opinion permitting precisely such dragnet investigation (*infra*, p. 56):

> "After the important revelations of Winston M. Burdett, it was surely not a 'dragnet' process to call

appellant as a member of the working press to check on possible Communist Party activities among his fellow employees."

Thus, the court below held the Burdett testimony—that in the early '40s some Brooklyn Eagle and Newspaper Guild members had been Communists—sufficient to justify the Committee's calling at random fifteen years later any Times or "working press" employee to question him about his possible Communist associations.[10]

The "Question Under Inquiry"

Petitioner's initial uncertainty concerning the nature of the inquiry to which the Committee was subjecting him appears from a colloquy in the 1955 executive session (Tr. 56):

"Senator Hennings . . . having read your statement into the record, Mr. Shelton, are we to assume that

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[10] There are 5,700 New York Times employees; 30,000 "news reporting employees" in the country; and a far larger number of total employees on the 1,755 daily newspapers in the United States (see Tr. 180; 1959 Annual Report of the New York Times; Editor and Publisher Yearbook, 1960; Occupational Outlook Handbook, 1959, Bureau of Labor Statistics Bulletin 1255). And apart from the dragnet subpoena power which the decisions below would grant to a Congressional committee to call any of thousands of press employees because it had information that some few were Communists, the difficulty with this approach is that Mr. Sourwine made clear that the Committee did *not* call particular witnesses on any such basis. The following answer by Mr. Sourwine is illustrative:

"Q. I will repeat the question. Did the committee call the past and present New York Times employees before it in these executive and open sessions because it believed there was a high percentage of ex-communists on the Times?

"A. No. The committee called these people before it because it had information that the persons whom it called were in a position to give the committee information about matters it was investigating" (Tr. 223; see also 225-26).

your objection goes to the entire inquiry or to the question which has been put to you?

"Mr. Shelton. The actual basis for the inquiry has not been stated to me, nor does it appear on the subpoena."

Before he was sworn at the 1956 hearing, petitioner again stated (Tr. 105-106):

"I challenge the jurisdiction of the committee to call me here in Washington, based on the fact that my testimony in executive session makes it clear that the committee will obtain no information from me that could possibly assist it in any legislative purpose . . . Furthermore, I fail to see why I am involved in this hearing, which the chairman said on Wednesday stems from the Burdett testimony."

On refusing to answer certain questions, including those for which he was tried for contempt, petitioner in each instance reaffirmed this challenge to the "jurisdiction of the committee". However, the Committee never once provided enlightenment to petitioner as to the "question under inquiry" nor his relationship thereto.[11]

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[11] Since the Committee hearing took place before this Court's *Watkins* decision, the Committee itself then felt no obligation to define to witnesses the nature of its inquiry. The Committee's then position appears from the 1955 executive session; when Mr. Sourwine gratuitously inquired of petitioner whether he knew his counsel (Osmond Fraenkel) to be a Communist, the following ensued (Tr. 64-65):

"Mr. Fraenkel. The witness has stated he does not consider the question pertinent, nor do I. I would advise him, as his lawyer, that he is not obliged to answer such a question.

"Senator Hennings. Then you are advising him not to answer on the ground that the question is lacking in relevancy or pertinency?

"Mr. Fraenkel. That is right.

"Senator Hennings. *The Chair might observe, sir that it would*

The "question under inquiry" in the New York Times hearing of the Committee was, from the first, doomed to remain in doubt, for the Committee had never even met to authorize the investigation, much less to determine its scope. As Senator Hennings stated at the opening (Tr. 86): "*the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings.*" The Times hearing accordingly covered a number of diverse and unrelated subjects without ever focusing on a single subject under inquiry. It has subsequently been suggested that when petitioner was interrogated: (1) there was no more limited question under inquiry than the authorizing resolution—i.e., than Communism generally; (2) the question under inquiry was Communist infiltration into news media; (3) the question under inquiry was Communist attempts to infiltrate the New York Typographical Union; and (4) the question under inquiry was Communism on the New York Times. In this case, one or more of these "questions under inquiry" were espoused by the Committee Chairman, by Senator Hennings, by prosecution witness Sourwine, and the courts below:

i. *The Committee Views.* The 1956 Times hearing was denominated by the Committee when it printed it as "Strategy and Tactics of World Communism, *Communist Activity in New York*" (Gov. Exh. No. 7). Senator Eastland, however, spoke of the hearing at the opening on January 4, 1956, as one to "pursue every lead which developed out of the Burdett testimony" (Tr. 83);[12] he said "we

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seem to me rather difficult for you to determine as counsel or for this witness to determine what is relevant or what is pertinent to the subject matter of the entire inquiry."

[12] No one in this case has ever suggested that Burdett mentioned Robert Shelton or any Shelton, or provided a lead to any Shelton. As Counsel Sourwine testified below, the Committee never had any information concerning a Shelton at the Times, other than the alleged anonymous letter (Tr. 153).

are not . . . investigating any newspaper or any group of newspapers" (Tr. 87). Senator Hennings, on the other hand, said, "the committee is interested in the extent and nature of so-called Communist infiltration, if such exists, into any news-dispensing agency" (Tr. 86).

ii. *The Prosecution's Theory.* A different theory was expressed in the Government's bill of particulars concerning the "question under inquiry" (J.A. 5-6). Prior to trial, petitioner had moved to quash the indictment because it failed to advise him of the "question under inquiry," an element of 2 U.S.C. § 192 (J.A. 8). Judge Holtzoff denied that motion, whereupon counsel asked instead for a bill of particulars as to the nature of the "question under inquiry" upon which the Government was relying under the indictment (J.A. 2-5). Judge Holtzoff granted that motion, and the prosecution stated in open court that the question under inquiry which the Government would prove under the indictment was the authorizing language of Senate Resolution 366, *and no more limited inquiry* (J.A. 6):

> "Mr. Hitz . . . As to the second asking, the Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.
>
> "This committee was conducting the inquiry for the purpose contained in the resolution and no lesser purpose . . ."[13]

[13] Earlier in the same colloquy Mr. Hitz had stated:

> ". . . the authority that this subcommittee was acting under is found in the resolution which I have already referred to, and there is no particularly defined inquiry less than the full authority to which this committee was restricted at this particular hearing" (J.A. 3).

iii. *The Sourwine Evidence.* A still different view of the "question under inquiry" emerged from the trial testimony of Government witness Sourwine. He testified that there were three diverse questions simultaneously under inquiry at the time of petitioner's appearance (Tr. 195-196):

> "Q. . . . what was the question under inquiry when the defendant testified?
>
> "A. Well, there are two ways to answer that. Broadly, the question under inquiry was the scope and extent and activities of the communist conspiracy against the United States, more specifically, as it applied to the New York area, and on the particular day he testified, and with regard to his testimony, still more specifically within that broader area, and we endeavored to get information about communist activity in the New York Times or in connection with employees of the New York Times or by such employees.
>
> "Q. So there are three gradations.
>
> "A. You can make as many gradations as you want. I am attempting to answer your question.
>
> "The committee, every time it sits, Mr. Rauh, sits with its full authority. That authority is fixed by the Senate of the United States, and neither the full committee nor the subcommittee can change it. I am trying to be responsive to your question.
>
> "When the committee was questioning this particular witness, within the area of its much broader investigation, it was concerned with the particular area of that broader investigation which concerned communist activity among newspaper people, communist activity on the New York Times, and communist

activity in an effort to infiltrate the Typographical Union in New York."

iv. *The Courts' View.* Contrary both to the bill of particulars and the government's proof, the District Court ruled in its opinion that: "The Court finds that the hearing in question dealt with the existence and extent of subversive infiltration in the news media" (J.A. 19-20) and that "the subcommittee was then engaged in attempting to ascertain the extent and nature of Communist infiltration into news dispensing agencies" (J.A. 19). The Court of Appeals opinion simply adopts Chairman Eastland's description of the hearing as one to investigate Communist activities to "influence American public opinion through the press" (*infra*, p. 50). Neither of the opinions below makes mention of the bill of particulars, although the binding nature of the bill on the "question under inquiry" was explicitly urged before both of the courts below (see Tr. 291-293).

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On January 18, 1957, the District Court convicted petitioner on the first two counts of the indictment and acquitted him on the third count (J.A. 22). Prior to sentencing, petitioner's counsel requested suspension of any sentence of imprisonment, particularly in the light of the accepted consideration of petitioner's unblemished prior record. The Court told petitioner that "so far as your personal demeanor before the committee of the Congress, you didn't display the contemptuous attitude that many in the same category do", but the Court then sentenced him on each count to a fine and six months' concurrent imprisonment without suspension, stating that "The press and the radio reports this morning matters that are very dis-

turbing from the standpoint of communism and its threats to our republican form of Government, and in this case I do not feel that I can put you on probation" (Tr. Jan. 25, 1957, pp. 2-6). The Court of Appeals affirmed the judgment of the District Court on June 18, 1960.

Reason for Granting the Writ

This Case Presents in Most Compelling Fashion, Fundamental and Unresolved Issues Concerning Congressional Investigatory Procedures, Related to Issues Presently Pending on Grants of Certiorari

The principal issues which emerged from the trial, and to which the opinions below are addressed, are those relating to probable cause, the "question under inquiry", and the Committee's impairment of freedom of the press; related issues are presently pending on petitions granted in No. 33, *McPhaul* v. *United States;* No. 37, *Wilkinson* v. *United States;* and No. 54, *Braden* v. *United States.* The Court of Appeals for the District of Columbia Circuit recently affirmed a number of other contempt of Congress convictions coming from the Un-American Activities Committee and the Senate Internal Security Subcommittee. While the Court may desire to postpone action on the petitions for certiorari being filed in some of those cases until the decision of related cases already before the Court, we urge that the instant case be heard at the present term of Court because it is closely related to and would provide additional illumination on the issues in the three cases wherein this Court has already granted certiorari.

i. *Probable Cause.* This case squarely presents the applicability to Congressional investigating power of the Fourth Amendment guarantee that compulsory process shall not be used to call and question the citizen unless there is probable cause to believe that he is in possession of information

relevant to the pending inquiry.[14] The opinions below reject the applicability of the Fourth Amendment's probable cause requirement to the subpoena powers of a Congressional investigating committee. The District Court's rejection of the Fourth Amendment's applicability was explicit; that of the Court of Appeals was implicit in its ruling that any or all of 5,000 Times employees (indeed, any one or all of 30,000 journalists on the working press), could be called and questioned about Communist activity, not because the Committee had reason to believe they were informed thereon, but only on the random and improbable chance that they might be. The court below held that because Winston Burdett had testified that in 1940 some members of the press had been recruited as Communists, 15 years later an investigating committee could subpoena at random any member of the working press in the United States "to check on possible Communist Party activities among his fellow employees."[15]

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[14] Arbitrary and unreasonable questioning of the citizen by a Congressional committee is treated here as violative of Fourth Amendment guarantees. It is, of course, equally true that such questioning violates Fifth and First Amendment rights and that arbitrary "fishing expeditions" by Congressional committees can neither be held to be within their authorizing resolutions nor to be pertinent to any "question under inquiry" within the meaning of 2 U.S.C. § 192.

[15] No longer having the benefit of new identifications of Communists in whom the public is interested, the Committees now reach persons never "named" either as participants in or witnesses to Communist activity; they are not called because they hav information relevant to the Committee's inquiry but on the mere possibility that they might. Thus, in 1958 the House Un-American Activities Committee subpoenaed Frank Wilkinson (see No. 37, October Term, 1960) when it found him in Atlanta organizing public sentiment against its hearings there. And most recently, the Senate Internal Security Subcommittee subpoenaed Linus Pauling under circumstances reported in the Washington Post of June 20, 1960:

> "He was subpoenaed Saturday night after he urged a nuclear test ban in an address before members of the Women's International League for Peace and Freedom at the Willard.
>
> Subcommittee Chairman James O. Eastland (D-Miss.) ordered Pauling to appear at 10 a.m. today to tell what he knows about 'Com-

Ever since this Court's decision in 1886 in *Boyd* v. *United States*, 116 U.S. 616, the probable cause guarantee of the Fourth Amendment (which is, to some extent, overlapped by the Fifth Amendment's due process requirement of reasonable governmental conduct) has been held applicable to the subpoena power. Perhaps the best summary of the Fourth Amendment's protection against all forms of governmental intrusion upon the privacy of the individual appears in the classic dissenting opinion of Mr. Justice Brandeis in *Olmstead* v. *United States*, 277 U.S. 438, 478:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, *every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment*" (emphasis added).

The Fourth Amendment's probable cause requirement is today unquestionably applicable to every form of summons and subpoena, whether issued by a court (see *Boyd* v.

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munist participation in or support of a propaganda campaign against nuclear testing and other Communist or Communist-front activities with respect to which you may have knowledge.'

'I don't know anything about Communist activities', Pauling said at a news conference, 'but I'll be glad to educate members of the subcommittee on this very important matter of nuclear war.'"

United States, 116 U.S. 616), a grand jury (see *Hale* v. *Henkel*, 201 U.S. 43), a federal regulatory agency (see *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447) or an Executive Department (see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186).

The Fourth Amendment is equally applicable to Congressional subpoena power.[16] As early as *Sinclair* v. *United States*, 279 U.S. 263, 292, in the course of a thorough analysis of the Congressional investigatory power, this Court reviewed its interdictions of "fishing-expedition" abuse of the subpoena, and declared:

> "It has always been recognized in this country, and it is well to remember that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary and unreasonable inquiries and disclosures. . . ."

In *Watkins* v. *United States*, 354 U.S. 178, 188, this Court declared:

> "The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure."

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[16] In *United States* v. *Orman*, 207 F. 2d 148, 154-155, speaking of Congressional committee investigative powers, the Court ruled out the idea that:

> "a congressional committee possesses the power to examine private citizens indiscriminately in the mere hope of stumbling upon valuable information and to cite them for contempt if they refuse to answer . . . the United States in a contempt proceeding must prove . . . the relation of the questions, the documents *and the particular witness* to the investigation" (emphasis added).

Finally, only last year, in upholding the conviction in *Barenblatt* v. *United States*, 360 U.S. 109, 134, this Court made clear that Barenblatt's interrogation did not involve:

> *"indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee."*

The rulings below would sanction just such Congressional "dragnet procedures." If these rulings are left unreviewed and Congressional Committees are permitted to exercise dragnet powers of compulsory interrogation of witnesses without probable cause, they are the only federal authority in the nation with subpoena powers beyond the reach of the Fourth Amendment. It is submitted that such a startling departure from our constitutional tradition, so clearly in conflict with the principles frequently announced by this Court, cannot go unreviewed. There is urgent need for this Court's authoritative disposition of the contention that probable cause is inapplicable to the Congressional investigatory power.

ii. *Question Under Inquiry.* Equally needful is this Court's review of the ruling below on the "question under inquiry" issue. The difficulties in this case concerning the nature of the "question under inquiry" in petitioner's interrogation began with the inquiry, were exacerbated at the trial, and remain unanswered even after judgment in the Court of Appeals.[17] Certainly, where the Committee, the

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[17] The Court of Appeals opinion suggests that petitioner failed to inquire of the Committee concerning the "question under inquiry" and that the Committee therefore had no obligation to make the point luminous to him. But prior to being sworn at the 1956 hearing, petitioner challenged the jurisdiction of the Committee on the grounds that it was clear that "the Committee will obtain no information from me that will assist it in any legislative purpose" and said, "I fail to see why I am involved in this hearing which the chairman said on Wednesday stems from the Burdett testimony" (Tr. 105). If such an initial challenge, followed by specific objection to the jurisdiction of the Com-

prosecution, the prosecution's evidence, and the findings of the courts on the "question under inquiry" are as diverse and contradictory as in the instant case, it cannot be said that the point was made sufficiently luminous to the witness at the time of the Committee interrogation to meet constitutional and statutory requirements. As this Court stated in *Watkins* regarding the "pertinent to the question under inquiry" element of 2 U.S.C. § 192:

> "The problem attains proportion when viewed from the standpoint of the witness who appears before a congressional committee. . . . It is obvious that a person compelled to make this choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense. The 'vice of vagueness' must be avoided here as in all other crimes" (208-209).

The present case is also foursquare with the *Watkins* holding (reiterated in the majority opinion in *Barenblatt*), that an authorizing resolution such as that of the House Un-American Activities Committee is not itself sufficiently precise to serve as a "question under inquiry" within the meaning of 2 U.S.C. § 192. In the District Court, the government, by its bill of particulars, elected to rely on precisely such a broad authorizing resolution (Senate Resolution 366) and *"no lesser inquiry"* as the question under inquiry to be proved. While both courts below sought to find a more limited inquiry—Communist influence on the

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mittee at the time of refusals to answer (Tr. 119-128), did not place upon the Committee the duty of enlightening petitioner as to the "question under inquiry", then a Congressional witness has truly become a pawn in a battle of legal niceties.

Times or in the press—the bill of particulars is, of course, binding for the proposition that no such limited inquiry was being pursued by the Committee in its interrogation of petitioner. See *United States* v. *Neff*, 212 F.2d 297, 309, and authorities there cited.[18] The only question that remains is whether Section (3) of Senate Resolution 366 (see *infra*, p. 58) has the specificity which this Court ruled in *Watkins* was lacking in the House Un-American Activities Committee's authorizing resolution. Even cursory comparison of the two texts is sufficient to demonstrate that the almost identical language of the Senate Resolution (see pp. 57-58, *infra*) is no more precise as a "question under inquiry" than is that of the House.[19] The holding of

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[18] The bill of particulars also undermines the Court of Appeals' suggestion that petitioner was able at the time of his interrogation to perceive some limited "question under inquiry", for if one year later, the Assistant United States Attorney preparing the case for trial could find no more limited question under inquiry than the broad authorizing resolution, it would indeed have been clairvoyance for petitioner to have perceived such a limited question the year before.

[19] In a companion case involving a Times employee (*United States* v. *Peck*, 154 F. Supp. 603, 609) Judge Youngdahl entered an acquittal, stating: "In its resolution, the Senate did not undertake the troublesome task of defining 'subversive activities'. The Senate did explicitly state, however, that the investigation was not limited to 'movement(s) seeking to overthrow the Government of the United States by force and violence.' But no indication is given as to what else is deemed 'subversive', nor is the Court aware of a satisfactory definition." The Court added that at trial,

> "the Court rejected the government's contention that the question under inquiry was 'the full Committee powers' or the entire scope of the authorizing resolution. The Supreme Court *Watkins* decision would clearly require a reversal of Peck's conviction, had the Court found the subject under inquiry to be as broad and as vague as that which the government urged."

In another companion case, *Whitman* v. *United States*, the contempt citation was affirmed by the Court of Appeals for the District of Columbia Circuit on July 7, 1960, on the authority of the opinion below in the instant case.

Watkins on the "question under inquiry" is thus precisely applicable in the present case.

iii. *Freedom of the Press.* Additional reason for review is provided by the Committee's gratuitous trespass on First Amendment rights. While the hearing record is replete with self-serving protestations that the Committee was not investigating the press but merely Communist influence therein, the full record demonstrates the contrary. In its interrogation of thirty Times witnesses, the Committee certainly did not restrict itself to questions about Communist Party membership and activity, but frequently delved into the content of material appearing in the press. Indeed, there is ample evidence (see Tr. 207-244) that the New York Times was purposefully selected by Sourwine and Chairman Eastland as a Committee target.[20]

While it is a source of gratification that the New York Times retained petitioner in its employ, the loss in actual freedom of the press cannot be measured by the courage of its most powerful representative. The content of the press is, of course, shaped by persons who write the news. The inevitable effect of wholesale interrogation and exposure of any alleged Communists or others the Committee could find on the New York Times is to discourage the Times and other newspapers from hiring persons of unpopular, unorthodox, or minority views and associations who may become the subjects of similar Congressional scrutiny. The resulting elimination of persons from the press who hold or once held unorthodox, unpopular, or minority views or

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[20] The New York Times itself so construed the hearings in a notable editorial "The Voice of a Free Press" (Tr. 232), in which it found it "quite obvious that the Eastland investigation has been aimed with particular emphasis at the New York Times." The editorial called upon the "inescapable responsibility of Congress" to insure that inquiries of the press "be conducted in good faith and not motivated by ulterior purpose."

associations is as effective a form of censorship as the deletion of the material they contribute to the press. But absent a clearly defined "question under inquiry," it is impossible for the witness, the Committee, or the courts, to make the delicate weighing between governmental interest and First Amendment rights which this Court's *Watkins* and *Barenblatt* decisions require. The undeniably repressive effect upon First Amendment freedoms of a hearing such as the 1956 New York Times inquiry thus underlines the importance of holding Congressional hearings to accepted constitutional and statutory standards of procedural fairness.

iv. *Additional Questions.* Three further questions worthy of this Court's review are presented in this case:

First, contrary to the ruling of the Court of Appeals for the Second Circuit in *United States* v. *Lamont*, 236 F.2d 312, the court below held than an indictment under 2 U.S.C. § 192 for failing to answer questions pertinent to the "question under inquiry" need not set forth the actual "question under inquiry" involved. But it seems clear that the minimal notice function of a criminal indictment is not fairly met when it fails to set forth so significant an element of the offense. A likely result of the omission is illustrated in the instant case, where the Government at the outset of the trial, the Government's witness at the trial, and the courts below, all adopted differing views of the "question under inquiry."[21]

Second, the court below rejected, *sub silentio*, a point on which this Court granted certiorari in *Quinn* v. *United States*, 347 U.S. 1008, and *Watkins* v. *United States*, 352

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[21] The failure to set forth in the indictment the question under inquiry to be proved was doubly prejudicial in this case since the Government at the trial failed to adhere to the bill of particulars which it was directed to give petitioner.

U.S. 822, whether when by proper motion and affidavit grounds for belief are set forth that by virtue of fear and bias federal employee grand jurors were disabled from properly exercising their function, the defendant is entitled to a dismissal of the indictment or a preliminary hearing thereon. While the issue was not reached in *Quinn* or *Watkins*, nothing has occurred since this Court's grants of review in those cases which has made the question as to the impartiality of the grand jury any less significant.

Finally, it appears clearly improper for the District Court to have separately fined petitioner $250 on two counts, both based upon failure to answer questions falling in the same generally defined area in which he had indicated his refusal to testify. This Court has held that the prosecution in a court proceeding cannot multiply the "contempt" (and consequently the punishment) by multiplying the questions which it knows the witness will not answer. *Yates* v. *United States*, 355 U.S. 66. Whether or not the same salutory rule should apply to Congressional witnesses is certainly an appropriate question for this Court's consideration.

Conclusion

In recent terms of this Court it has been called upon to define how far due process provides procedural safeguards to witnesses in Congressional investigations. The degree to which the closely related Fourth Amendment safeguards provide protection against unreasonable or arbitrary subjection of the citizen to Congressional interrogation has not, however, received clear delineation. Yet it is precisely because of the nature of Congressional investigations that the Fourth Amendment assumes critical importance, for once within the investigative hearing room, the witness has but limited protections, without many of the

rights which attend adjudicatory inquiries. Equally significant, once subpoenaed, the witness is subjected to a wide range of inquiry into belief, association and conduct in one of the most sensitive areas of constitutional liberty. But if the ruling below stands unreversed, then Congressional committees may subpoena the "man off the press" or the "man off the street," to inquire concerning Communist activities, without reason to believe that he possesses information on the subject. Dragnet inquisition has then been added to the armory of Congressional investigating power.

It is respectfully submitted that this case presents in most compelling fashion fundamental issues concerning Congressional investigatory procedures, issues related to those involved in the grants of certiorari in No. 33, *McPhaul* v. *United States;* No. 37, *Wilkinson* v. *United States;* and No. 54, *Braden* v. *United States*. Accordingly, certiorari should be granted and the case set for argument with those cases.

Respectfully submitted,

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APPENDIX A

Opinion of District Court, January 18, 1957

Joseph L. Rauh, Jr., and John Silard of Washington, D. C., for the defendant.

Oliver Gasch, United States Attorney, and William Hitz, Assistant United States Attorney, of Washington, D. C., for the United States.

It is charged by indictment in three counts that the defendant, Robert Shelton, in contempt of the lawful powers of Congress and contrary to law,[1] refused on January 6, 1956, to answer certain pertinent questions propounded to him by the Senate Subcommittee on Internal Security[2] while under oath and appearing as a witness to testify in connection with an inquiry then being conducted by the Subcommittee pursuant lawful authority.

It is the Government's position that the Subcommittee, while in the lawful exercise of the powers and duties conferred upon it by the pertinent resolutions,[3] caused the defendant to appear before it on the 7th day of December, 1955, in New York City, and again on the 6th day of
385 January, 1956, in Washington, D. C., to testify concerning his knowledge of matters pertinent to the subjects then under investigation and study by the Subcommittee in furtherance of the Congressional responsibilities in such areas of national concern. It is further asserted that upon appearing before the Subcommittee on January 6, 1956, defendant refused to answer pertinent interrogatories, including the following questions, when ordered and directed to do so by the presiding officer of the Subcommittee:—

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[1] 11 Stat. 155, as amended, R.S. Section 102; 52 Stat. 942 2 U.S.C. Sect. 192.

[2] The Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, of the Committee on the Judiciary of the United States Senate.

[3] Legislative Reorganization Act of 1946, Sect. 102(1)(k), (60 Stat. 818); Senate Res. 336, 81st Congress 2nd Session (1950); Senate Res. 58, 84th Congress, 1st Session (1955); and the Standing Rules of the U. S. Senate.

Count One: "Are you, sir, a member of the Communist Party, U.S.A.?"

Count Two: "Did you ever have any conversation with Matilda Landsman?"

Count Three: "What did you tell them?"

Defendant does not question the Government's proof that, on the date and in the place alleged in the indictment, he appeared before the Subcommittee as a witness and while under oath, and after being ordered and directed by the presiding officer to do so, refused to answer the questions set out in counts one through three of the indictment. Defendant does not interpose the Fifth Amendment to the United States Constitution in justification of his refusal to answer the questions insofar as such constitutional provision prohibits compulsory self-incrimination. It is defendant's position that the evidence before this Court shows that he was justified in refusing to answer the questions because the Subcommittee was acting in excess of its lawful authority (1) in calling him at all; (2) by the Government's failure to prove that any precise "question" within the authority of the subcommittee was under inquiry at the times in issue; (3) by the Government's failure to prove that the hearing before the Subcommittee on January 6, 1956, was pursuant the authority set out in the indictment; (4) by the Government's failure to prove that the interrogation of defendant had any legislative purpose;
386 and (5) that the statute defining the offense defendant is charged with committing, read in conjunction with the enabling resolutions of the Subcommittee, is so vague and indefinite as to deprive the defendant of due process of law.[4]

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[4] Defendant filed his "Motion for Judgment of Acquittal", urging ten grounds therefore as follows, which points can be fully discussed under the contentions enumerated in the body of this opinion:—

"1. The Government has failed to prove what, if any, was the question under inquiry by the committee when it called defendant.

"2. The Government has failed to prove that the questions asked defendant were pertinent to any question under inquiry by the committee.

"3. The Government has failed to prove that the question under in-

387 The defendant is not required to adduce evidence of his innocence in the absence of proof by the Government which establishes the enumerated elements of the charged violations beyond a reasonable doubt. In criminal prosecutions for contempt of Congress, as in every criminal prosecution, the defendant is presumed to be innocent of the charges upon which he is indicted. And such pre-

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quiry by the committee, when it called defendant, was within the authority alleged in the indictment.

"4. The Government has failed to prove that on January 6, 1956, the subcommittee in question was conducting hearings pursuant to the specific authority alleged in the indictment or to any other grant of power from the United States Senate.

"5. The Government has failed to prove that the questioning of defendant and the questions which form the basis of the indictment had any valid legislative purpose. The evidence indicates that in fact the committee had no valid legislative purpose in interrogating defendant but rather sought to expose him and others to contempt and ridicule in violation of the constitutional doctrine of separation of powers which places limitations upon the exercise of legislative power.

"6. The questioning of defendant and the questions which form the basis of the indictment violated the rights of defendant and others to the freedom of speech, assembly and petition guaranteed by the First Amendment.

"7. The questioning of defendant and the questions which form the basis of the indictment violated the freedom of the press guaranteed by the First Amendment.

"8. At the time that defendant was questioned, the committee had no information that he was or had been a Communist or a member of a Communist front organization nor any other information reflecting adversely upon him. The information in the possession of the committee reflected upon Willard Shelton, a well known newspaperman rather than upon the defendant, who was called entirely by accident. Under these circumstances, the proceedings violated defendant's rights of privacy under the First Amendment and were not within any legislative power granted to or exercisable by the committee.

"9. Defendant's rights under the Fourth and Fifth Amendments were violated by arbitrary and discriminatory subpoenaing of defendant as a witness before the committee when there was no probable cause to believe that defendant had engaged in or had information about Communism, subversion, espionage or other matters within the alleged jurisdiction of the committee.

"10. 2 U.S.C. 192, read together with the alleged authorization of the subcommittee, is so vague and indefinite as to deprive defendant of the due process of law guaranteed by the Fifth Amendment.

sumption remains with this defendant until such time as the Government proves beyond a reasonable doubt that, as to each count of the indictment, the defendant, while appearing as a witness before a duly authorized Congressional committee,[5] was directed and ordered to answer the interrogatory set out; that the specific question was pertinent to matters within the jurisdiction of the Committee then under investigation; that the investigation was in furtherance of a proper Congressional purpose; and that the defendant refused to answer such interrogatory when so ordered and directed to do so. Quinn v. United States, 349 U.S. 155 (1950); Bowers v. United States, (C.A. D.C. 1953) 202 F. 2nd 447.

To establish the authority of the subcommittee, the Government introduced the enabling resolution, Sen. Res. 366, 81st. Cong. 2nd Sess., 1950, which conferred original authority upon the Senate Judiciary Committee, or any duly authorized subcommittee thereof, directing such bodies "to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, * * *, including, but not limited to espionage, sabotage, and infiltration by persons who are or may be under the domination of
388 the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force or violence." In addition thereto, the Government introduced the resolution continuing such original authority in the Judiciary Committee, or its duly authorized subcommittees, with provisons for expenditures during the 84th Congress,[6] and copies of the minutes of

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[5] The word "committee" is used in its generic sense to include "subcommittee". Barenblatt v. United States, (C.A.D.C. No. 13,327) decided January 3, 1957; United States v. Knowles (D.C.D.C. No. 1211-56 Criminal) decided January 10, 1957.

[6] Senate Resolution 58, 84th Congress, 1st Session, 1955.

Senate Committee on the Judiciary for January 20, 1955, wherein the subcommittee in question was by resolution continued during the 84th Congress,[7] as well as a copy of the minutes of the Senate Committee on the Judiciary for February 7, 1955, listing the names of the Senators appointed to serve upon the Subcommittee on Internal Security. The copies of the minutes of the Committee were received in evidence as a part of the official records of the subcommittee over the objection that they showed no authority in the subcommittee.

The Government introduced the certification of the defendant's contempt by the United States Senate to the United States Attorney for the District of Columbia, the Senate Resolution ordering such certification, and a copy of Senate Report No. 1934, 84th Congress, 2nd Session (1956), which sets out the proceedings before the subcommittee giving rise to the citation. The documents are in proper form and neither their authenticity nor regularity is questioned.

Mr. Julius G. Sourwine appeared as a witness for the Government. His testimony disclosed that at the times in question he was Chief Counsel for the subcommittee and personally familiar with the facts and circumstances leading up to defendant's appearances before that body.

389 In substance the witness testified that the subcommittee had information indicating the existence of Communist activity in newspaper and publishing fields in New York City, implicating one Matilda Landsman as being active in the Communist Party and the Typographical Union in that city. Additionally, the witness alluded to confidential information in the possession of the subcommittee which provided names of several suspected Communists employed in various capacities by certain newspapers, including the company which at that time employed Matilda Landsman and this defendant. The witness testi-

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[7] "RESOLVED, by the Committee on the Judiciary, That the Special Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws under S. Res. 366 (81st Cong.) be continued as a Special Subcommittee of the Committee on the Judiciary during the 84th Congress and that the Committee report an appropriate original resolution favorably to the Senate for this purpose."

fied that the subcommittee did not have any information indicating that this defendant was either a Communist or had engaged in Communist activities. The subcommittee did, according to the witness, have information that one "Shelton," who was employed in the "news" side of a particular newspaper, was informed, if not active, in Communist infiltration into the newspaper media of mass communication.

Upon the basis of such information the subcommittee late in 1955, held an executive session in New York City, in connection with which a summons was issued to one "Willard Shelton" at a specific address, requiring his attendance on November 23, 1955, at a time and place certain. The evidence was that the name "Willard" had been affixed upon the summons by error, for in fact the subcommittee did not possess the first name of the "Shelton" linked by name to the subversive activity it sought to investigate and study. There is evidence in the record upon the manner in which the defendant's name came to be added to this summons, but the view the Court takes of this subject is that it has no relevancy to this case or any of the issues in it. This is true for the reason that the defendant did not initially appear before the executive session of the subcommittee pursuant the disputed summons. The summons served upon the defendant requiring his attendance before the subcommittee on December 7,
390 1955, was issued on November 23, 1955, by James O. Eastland, "Chairman, Committee on the Judiciary, and Internal Security Subcommission," to Thomas J. Lunney, United States Marshal, Southern District of New York, who according to his official return thereof recited the service of the summons on the defendant by leaving a copy thereof with him at his place of employment on November 29, 1955.[8]

The official transcript of the proceedings before the subcommittee involving this defendant was admitted into evidence without objection. It clearly shows beyond any reasonable doubt that at the time and place alleged in the indictment the defendant appeared before the subcommit-

[8] Senate Report No. 1934, 84th Congress, 2nd Session (1956) p. 2.

tee, was sworn as a witness, ordered and directed to answer the three questions set out in the counts of the indictment, and refused to do so. The contentions of the defendant are urged in justification of this established conduct.

Defendant's contention that the subcommittee exceeded its authority in calling him as a witness under the circumstances of this case is grounded upon several propositions. The technical objections arising from the issuance, service and return of the summons were predicated upon the apparent belief the the summons originally issued to "Willard Shelton" was the process relied upon to bring the defendant initially within the jurisdiction of the subcommittee. As previously pointed out, the official transcript of the proceedings before the subcommittee which involve this defendant commenced on November 23, 1955, with the issuance of a summons which was personally served on the defendant pursuant lawful authority on November 29, 1955, and return thereof properly executed that same day. The summons requiring defendant's attendance before the subcommittee is sufficient on its face to bring him within the jurisdiction and authority of the subcommittee, and the Court so holds.

391 Defendant's contention that the subcommittee exceeded it's authority in summoning him under the facts of this case rests upon his interpretation of the First Amendment to the United States Constitution. It is the position of the defendant that the authority of Congress to require the attendance of witnesses before it's duly authorized committees, investigating matters within the legislative powers of Congress, is limited by the individual citizen's right of privacy guaranteed by the First Amendment. It is then argued that where a committee seeks to summons a witness for the purpose of taking testimony there must exist a "probable cause" for the committee to believe that such person possesses pertinent information on the subject under lawful investigation or such summons is without force or effect.

Proceeding upon the assumption that "probable cause", in the sense employed by defendant is required for issuance of a valid summons by the Congress, it is argued that the only evidence of "probable cause" in this case for the

calling of this defendant as a witness was contained in the confidential letter linking the name "Shelton" with the subject under inquiry. This line of argument was relied upon in an effort to secure the confidential letter from the files of the subcommittee for inspection and introduction into the record as the "best evidence" of "probable cause". The Government objected to the request for the letter on the grounds that it is not material or relevant to issues of the case; it contains confidential information including the names of additional persons known or suspected to be active in the Communist movement; it contains the pseudonym of a confidential informant of the subcommittee.

The Court carefully considered defendant's contention respecting the requirement of "probable cause" for issuance of a Congressional summons, and the relevancy of the confidential letter to the issues of this case. The application for production of the letter was denied at trial and

392 the Court is convinced that such ruling was proper in light of the law applicable to this case and the nature of the letter, as well as it's relevancy, in this matter.

The Court has examined at length the authorities bearing upon the extent of the investigative powers of the Congress. The extent of the power has been defined in authoritative decisions by the Supreme Court written after prolonged deliberation.[9] There can be no doubt about the power of Congress, and it's committees, to investigate as a necessary attribute of the duty and authority to legislate. *McGrain* v. *Daugherty, 273 U.S. 135 (1927); Sinclair* v. *United States, 279 U.S. 263 (1929)*. And, such investigative power has been characterized as being "co-extensive with the power to legislate"[10], subject to the limitations imposed by the Fifth Amendment to the United States Constitution[11] and the right of privacy in matters unrelated

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[9] The Court was two years in deciding and writing the opinion in McGrain v. Daugherty, 279 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927).

[10] Quinn v. United States, 349 U.S. 155 (1955).

[11] United States v. Rosen, 174 F.2d 187 (2nd Cir. 1949), cert. denied 338 U.S. 851.

to a valid legislative purpose.[12] There is a complete want of precedent for the proposition defendant urges, which in simplest terms would limit the powers of a duly authorized committee of the Congress, in conducting an inquiry for a legitimate legislative purpose, by permitting such committee, and hence Congress itself, to compel the attendence and testimony of only such witnesses as the Courts might judicially determine were "reasonably expected to be in possession of pertinent information." The doctrine of "separation of powers" and a rightful regard for the authority of the legislative branch of government refutes a judicial evaluation of those matters which clearly are within the discretion of the Congress which alone is responsible for the exercise of the authority from which the disputed power arises.

393 The established limitations upon the Congressional investigative powers, which require a legislative purpose and inquiries pertinent thereto, provide ample protection to the private affairs of witnesses appearing before duly authorized committees of the Congress. *Barsky* v. *United States, (C.A.D.C. 1948) 167 F.2d 241, cert. denied, 334 U.S. 843 (1948); Quinn* v. *United States, supra.; Barenblatt* v. *United States, (C.A.D.C. 1957) No. 13,327, decided January 3, 1957.*

Beyond the fact that the Court does not find judicial power to determine what witnesses Congress may call in furtherance of it's legislative purposes and compel pertinent testimony thereon, the record of this case discloses beyond any reasonable doubt that the subcommittee had information in it's possession at the time defendant was initially summoned to appear before it which established a "reasonable cause" for requiring his testimony. The subcommittee had information, apart from the confidential letter which indicated Communist infiltration into the New York Typographical Union and elements of the New York newspapers, including the one by which defendant was employed. In light of these facts, it was not only reasonable for the subcommittee to call the defendant and other employees from the press organization at which he worked,

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[12] Kilbourn v. Thompson, 103 U.S. 168, 26 L. Ed. 377 (1880).

such a procedure by the subcommittee appeared expedient in furtherance of its express duties. Cf. Watkins v. United States, 233 F.2d 681 (C.A.D.C. 1955) cert. granted 77 S.Ct. 62 (1956); Barsky v. United States, *supra.*

The legislative purpose underlying the investigation and studies committed by the Senate to the committee is concisely expressed by the enabling resolutions. Legislation in the field of foreign subversion and infiltration by subversives in this country is clearly within the Congressional authority. *Barenblatt* v. *United States, supra; Barsky* v. *United States, supra.*

394 The defendant's contention that the Government failed to establish that any precise question, within the authority of the subcommittee, was under inquiry at the time in issue, is not established by the evidence in this case. The statement of the Chairman of the subcommittee at the commencement of the hearings in which defendant appeared in Washington, D. C., and testified, clearly show that the subcommittee was then engaged in attempting to ascertain the extent and nature of Communist infiltration into news dispensing agencies.[13] Such an inquiry is manifestly within the duties imposed upon the subcommittee by the enabling resolutions, and the authority of the subcommittee is measured by only the enabling resolutions creating it and charging it with specific duties.[14] The scope of a given hearing by a duly authorized subcommittee must be confined to those matters fairly within the delegated authority; beyond that, the subcommittee is not confined to a categorical subject within the area delegated to it pursuant law. *Cf. United States* v. *Knowles, (D.C.D.C. 1957) No. 1211-56 Criminal, decided January 10, (1957).* The Court finds that the hearing in question dealt with the existence and extent of subversive infiltration in the news media and was within the authority

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[13] Government Exhibit 7, pp. 1587-1589, *"Strategy and Tactics of World Communism,* Part 17.

[14] The authority of the Congress, and hence any of it's Committees, is at all times limited during investigations by the requirements that the investigation be in aid of legislation and the questions propounded pertinent to the subject matter under inquiry. *Quinn* v. *United States, supra.*

of the subcommittee. The Court also finds that defendant was fully aware of the precise subject under inquiry by the subcommittee at the time of his appearance before it in Washington, D. C., as evidenced by his prepared statement objecting to the jurisdiction of the subcom-
395 mittee.[15]

Defendant's contention that the hearing before the subcommittee on January 6, 1956, was not shown to have been pursuant the authority set out in the indictment is contrary to the evidence. The Government placed the pertinent resolutions and minutes in the record. These documents show the original authority of the Committee on the Judiciary from the United States Senate (Senate Res. 366, 81st Congress, 2nd Session), the continuation of that committee's original authority to the time in question, and the authority of the subcommittee, as well as it's composition, at the time in question. This evidence is adequate in all respects to show the authority of the subcommittee to act in the premises beyond a reasonable doubt.

The contention of the defendant that the hearing at which he testified and from which the indictment arose was not in furtherance of a legislative purpose proceeds on the assumption that a failure to have specific legislation in contemplation, or a failure to show that legislation was in fact redacted, establishes an absence of legislative purpose. This argument is patently unsound. The investigative power of Congress is not subject to the limitation that hearings must result in legislation or recommendations for legislation. See In re Chapman, 166 U.S. 661 (1897); Townsend v. United States, (C.A.D.C. 1938) 95 F. 2d 352; Barsky v. United States, (C.A.D.C. 1948), *supra*. The evidence defendant introduced to support his contention that a non-legislative purpose prompted the subject hearings is wanting in probative value and wholly insufficient to cast a doubt upon the true Congressional purpose underlying the delegation of the authority to the subcommittee or the purpose of the subcommittee in conducting the hearing in question. Indeed, where the subcommittee pro-

[15] Senate Report 1984, 84th Cong. 2nd Session, pp. 12, 14-16.

ceeds within the authority lawfully delegated to it by Congress, it would appear doubtful that want of legislative purpose could be established. *Cf. United States* v. *Josephson*, (*2nd Cir. 1947*) *165 F.2d 82, 89, cert.* 396 *denied 333 U.S. 838, 68 S.Ct. 609, 92 L.Ed. 1122 (1948)*; *Barsky* v. *United States, supra.* The Court finds that the hearings in question were, beyond a reasonable doubt, conducted in furtherance of a legislative purpose and within an area subject to the legislative powers of the Congress. *See Barenblatt* v. *United States, supra.*

The statute under which defendant is charged [16] is said to be so vague and indefinite, when read in conjunction with the enabling resolutions defining the authority of the subcommittee, as to deprive a defendant appearing before the subcommittee of due process of law. The statute in question has been judicially construed in many cases, the meaning to be attached to the words appearing in the provision is clear.[17] The statute itself is neither vague nor indefinite in it's proscriptions and mandates.

Where a witness appearing before a committee of the Congress is fully apprised of the extent of the authority of the body, and is in fact fully apprised of the precise subject, within the committee's authority, which is then under inquiry, as was the defendant in this instance, the duty of the witness is clear. Any question pertinent to the matter under inquiry must be answered, except insofar as the Fifth Amendment may provide justification for a refusal to answer. *United States* v. *Rosen, supra.; Quinn* v. *United States, supra.* The contention of statutory vagueness is without merit.[18]

The question which constitutes Count Three of the indictment is not pertinent to the subject established by the evidence to have been under inquiry at the time defendant testified. This count of the indictment will therefore be dismissed. Upon the evidence adduced at trial, it is the

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[16] Title 2, United States Code Section 192, 52 Stat. 942 (1946).

[17] *Merry, The Investigating Power of Congress, 40 A.B.A.J. 1073 (1954).*

[18] Cf. Watkins v. United States, (C.A.D.C. 1956) 233 F.2d 681, cert. granted 77 S. Ct. 62 (1956).

judgment of the Court that the defendant is guilty as charged in Counts One and Two of the Indictment
397 beyond a reasonable doubt. The verdict will be entered, the present bond of the defendant continued pending sentence. The cause will be referred to the Probation Officer for investigation and report, upon completion of which defendant will be advised of the date to appear for sentencing.

ROSS RIZLEY,
United States District Judge.

January 18, 1957.

Opinion of Court of Appeals, June 18, 1960

Before WASHINGTON, BASTIAN and BURGER, *Circuit Judges.*

BURGER, *Circuit Judge*: This is an appeal from conviction and judgment after trial in the District Court for contempt of Congress growing out of refusal to answer questions asked by the Senate Internal Security Subcommittee.*

Shelton, a copy editor of a New York newspaper, was subpoenaed and appeared, first in executive session in New York City on December 7, 1955, and later in open sessions of the Senate Internal Security Subcommittee in Washington, about a month later. At both hearings he refused to answer questions on the subject of membership in the Communist Party and as to whether he had ever had conversations with a certain named person identified by the Committee as a Communist. He was convicted for contempt on two counts for refusal to answer questions.[1] At Shelton's request he was tried without a jury.

The Subcommittee was operating under a Senate Resolution adopted in 1950,[2] and continued thereafter,[3] which empowered it to make a complete and continuing study and investigation of (1) the administration, operation and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection

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* The circumstances under which the appeals in this case and seven other contempt of Congress cases came on for hearing in this court appear in footnote 2 of the opinion in No. 13464, Gojack v. United States, decided this day.

[1] These questions were:

(1) "Are you, sir, a member of the Communist Party, U.S.A.?"

(2) "Did you ever have any conversation with Matilda Landsman?"

[2] S. Res. 366, 81st Cong., 2d Sess. (1950).

[3] S. Res. 7, 82d Cong., 1st Sess. (1951); S. Res. 198, 82d Cong., 1st Sess. (1951); S. Res. 314, 82d Cong., 2d Sess. (1952); S. Res. 46, 83d Cong., 1st Sess. (1953); S. Res. 172, 83d Cong., 2d Sess. (1954); S. Res. 40, 84th Cong., 1st Sess. (1955); S. Res. 58, 84th Cong., 1st Sess. (1955); S. Res. 209, 84th Cong., 2d Sess. (1956); S. Res. 174, 84th Cong., 2d Sess. (1956).

of the internal security of the United States; and (3) the extent, nature and effect of subversive activities in the United States, including, but not limited to, espionage, sabotage, and infiltration by persons under the domination of the foreign government or organizations controlling the World Communist movement seeking the overthrow of the United States Government by force and violence.

Under this Resolution the Subcommittee had previously heard testimony from one Winston M. Burdett, a well known journalist, foreign correspondent and newscaster, who had been a member of the Communist Party from 1937 to the early 1940's. Burdett cooperated fully with the Subcommittee and gave information including names of persons with whom he had worked; he did not refer to appellant. Later the hearings involved in this case were called as part of a program "to pursue every lead which developed out of the Burdett testimony."[4]

Some time before appellant was first subpoenaed to appear the Subcommittee had received a letter stating that one "Shelton" who worked for the New York Times was informed about if not active in a "Communist Group" and knew of the Communist Party activities in newspapers. The author of the letter was not identified in the record but there was testimony that he was known to the Subcommittee as a source of reliable information on other occasions. Thereafter a subpoena was issued addressed to "Willard Shelton." In attempting to make service the process server learned that there was no "Willard" Shelton employed by the New York Times, but that a "Robert" Shelton was employed as a news copy editor. The Subcommittee then authorized amendment of the subpoena to add the words "or Robert Shelton," and it was served on Robert Shelton, appellant here.

The record indicates that at the outset of appellant's appearance before the executive session, the Subcommittee was uncertain whether appellant was indeed the per-

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[4] Hearings before the Senate Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, 84th Cong., 2d Sess., pt. 17, at 1587 (1956).

son they thought to be in possession of information about Communist Party activities in newspapers generally or in his own newspaper. He was interrogated as to his background in order to clear up the question of identity, and in the course of that interrogation was asked and refused to answer substantially the questions set out in the margin, footnote 1. He was recalled 30 days later when the Subcommittee was holding public sessions.

At the opening of the public hearings in Washington on January 4, 1956, the Chairman pointed up the purpose of the inquiry, stating that the Subcommittee "could not be unmindful . . . that among the persons involved in this investigation have been many who were or are members of the press, and that the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration."[5] Early in the hearing Senator Hennings, a member of the Subcommittee, stated:

> . . . that it be generally known and understood that this is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press.[6]

The Subcommittee thus defined the general area of this series of hearings.

Immediately before appellant was called to the stand at the January 6 session, Senator Hennings also commented in part:

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations

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[5] *Ibid.*

[6] *Id.* at 1588.

of efforts of the Communist Party to infiltrate newspapers or other media of communication. . . .

* * * * *

. . . And I do think in the interest of justice and in the interests of preserving the integrity and the high standing of this committee, we should be particularly cautious and aware of the possibility of unnecessarily calling one before us who may have nothing to add to the general subject matter of our inquiry and who may be seriously damaged in his own personal and professional life.[7]

The Chairman at the same time referred to a telegram from the Long Island Press asking the Subcommittee to do what it could to emphasize that it had led in efforts to expose Communist infiltration of the press and that it was supporting the Subcommittee's work. The Chairman commented: "The committee is not investigating the Long Island Press or any other newspaper. We are aware of the fact that the Long Island Press was alert to the danger of the Communist infiltration from a very early date and was aggressive and effective in combating this danger in its own organization."[8] Upon being called to take the stand at this point appellant challenged the Subcommittee's power to call him as a witness.

Shelton was then asked the questions set forth in the indictment and he refused to answer. He was duly cited for contempt for his refusal and upon being tried was found guilty as charged. Appellant did not rely on the Fifth Amendment to the Constitution as a reason for his refusal to answer questions.

Appellant urges numerous errors in the proceeding below. Briefly stated, they are:

(1) That Part 3 of Senate Resolution 366 is too vague and imprecise to authorize or permit the Subcommittee to compel answers.

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[7] *Id.* at 1718-19.

[8] *Id.* at 1718.

(2) That appellant could fairly refuse to answer the questions since he was not told the "subject under inquiry," as required.
(3) That the pertinency of the questions to the subject matter was not explained.
(4) That the very nature of the questions violated appellant's First Amendment rights.
(5) That the indictment was faulty in failing to set out the "question under inquiry."
(6) That appellant need not answer any questions as the Subcommittee did not have "probable cause" to call him.

(1) The challenge to Senate Resolution 366, Part 3, as too vague to authorize the Subcommittee to compel answers to any questions must fall for several reasons. The Resolution as a whole and Part 3 in particular is more explicit than the House Resolution sustained by the Supreme Court in *Barenblatt* v. *United States*, 360 U.S. 109 (1959). The criticism of vagueness seemingly directed at the House Resolution in *Watkins* v. *United States*, 354 U.S. 178 (1957), does not in any event apply to Senate Resolution 366. In the recent *Barenblatt* case the Supreme Court confirmed the power of Congress to investigate activities of this character. Since its creation the Subcommittee has devoted itself to investigating subversive activities and Communist infiltration in many phases of American life, including infiltration in key industries, in television, radio and the press. Congressional awareness and approval of the work of the Committee can be found in numerous reports to the Congress by the parent Committee, and in repeated appropriations for its work.[9] In one report to the Senate the Committee specifically referred to the so-called "Burdett hearings" and other sessions in New York, relating to Communist efforts to infiltrate newspapers.[10] Whatever may have been argued at one time as to possible infirmities or vagueness in

[9] See note 3, *supra*.

[10] Report of the Subcommittee on Internal Security to the Committee on the Judiciary for 1955, S. Rep. No. 1385, 84th Cong., 2d Sess., at 4 (1956).

Resolution 366 under which the Committee was acting, the *Barenblatt* case and the legislative gloss attached to the Resolution has put this issue to rest.

(2) Appellant contends he was not informed of the subject or topic under inquiry and hence could not fairly decide whether he could be compelled to answer. The record discloses that at the opening of the hearings the investigation was expressly described as directed at the efforts and activities of the "international Communist conspiracy" to influence American public opinion through the press. Senator Hennings also stated the hearings were for the purpose of showing "such participation and such attempt as may be disclosed on the part of the Communist Party . . . to influence or to subvert the American press."[11] In a colloquy with the Chairman only moments before appellant took the stand, Senator Hennings restated the same idea in these words "this committee has the right to inquire into all efforts, or indeed all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication."[12] Thus the subject matter was explained with the required clarity so that appellant could fairly evaluate the risks of refusing to answer. That the explanations given by the Chairman and Senator Hennings varied in terms did not in any way impair the clarity of the explanation. The broad subject matter of Communist Party infiltration and subversion, the narrower subject of efforts to influence American public opinion and the specific effort to use the press to implement these objectives were spelled out with utmost clarity not only in the remarks of the Subcommittee members but also in the context of the hearings. In the course of the hearings to pursue the "Burdett testimony" 18 persons connected with communications media were called.[13] The interrogation of these witnesses

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[11] See note 6, *supra*.

[12] See note 7, *supra*.

[13] Six news reporters, one newspaper indexer, one motion picture exhibitor, an ex-bookseller, one newspaper proofreader, one magazine editor, two linotype operators, one copy editor, two news copyreaders, one ex-journalism professor, one newspaper education editor.

was directed at Communist activities in the press and communications field generally.

Moreover appellant's statement of objections to being questioned and his responses reveal his complete awareness of the subject matter of the inquiry. A great part of the statement [14] is concerned with the dangerous con-

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[14] "The question also threatens freedom of the press as guaranteed by the first amendment. I believe no other governmental body in the free world would call a newspaperman and demand to know his political beliefs and associations. However unknowingly or unwittingly, gentlemen, in the quest for internal security, you are threatening long-standing and hard-won American liberties. The Supreme Court has held that—

• • • the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate • • •

A body is the sum of its organs, a machine the sum of its parts. An attack on the smallest component of a body or machine is an attack on the whole. An invasion of my individual rights is an invasion of the rights of the paper that employs me and an invasion of the rights of the newspaper profession as a whole. This subcommittee is nudging the end of my copy pencil, it is peeking over my shoulder as I work. This subcommittee is engendering the fear that soon it will be looking into newsrooms all over the country.

If, as a result of my being called here, I am put under mental pressure to change one word or one sentence in material that I edit, an abridgment of freedom of the press will have taken place. Demanding to know what is going on in the mind of a newspaperman without inhibiting a free press is impossible. Your question acts as a form of 'prior restraint' on publishing, telling newspaper executives who should or who should not be on their staffs.

A journalist's credo I wholeheartedly support is 'to give the news impartially, without fear or favor, regardless of any party, sect, or interest involved. • • •' But by being called before you to answer about my political beliefs and associations I am placed in fear of having my loyalty considered suspect if I do not, while freely exercising my sound conscience, answer this committee's questions. I am obliged to seek your favor to guard my personal integrity, and that of the paper for which I work. . . .

• • • • •

Let, me, in complete sincerity, cooperate with you by saying this: One of the greatest contributions that can be made toward the internal security of the United States would be to promote the maintenance of a press that is free and unfettered and unafraid; a press and newspapermen that will criticize what they please and support what they please. It is a rightful role of the press to be a watchdog over government. It is not a rightful

sequences which the Committee's investigation would have on the freedom of the press. There is no difficulty in discerning his belief that a newspaperman should be immune from questions of the kind he refused to answer. While he was firm and clear in arguing that the questions were beyond the scope of the Committee's authority and that he was protected from inquiry by the First Amendment, he at no time asserted that the subject matter of the inquiry was too vague. Apart from the demonstrated clarity of the topic, we note that appellant sought no explanation of subject matter as he was entitled to do.

Significantly, here, as in the *Barenblatt* case, appellant's refusal to answer related to his own Communist Party affiliation, rather than the activities or membership of others. As in *Barenblatt*, the Subcommittee had a right to know if the witness was a member of the Communist Party, for that identification rendered more meaningful any testimony given by him concerning his own activities or concerning the presence or absence of Communist Party efforts to infiltrate the press. An inquiry into a possible conspiracy for infiltration or subversion of the press embraces the right to command the witness to say whether he is a member of the conspiracy, subject, of course, to the right of the witness to take refuge in the Fifth Amendment. *Barsky* v. *United States*, 83 U.S.App.D.C. 127, 167 F.2d 241, *cert. denied*, 334 U.S. 843 (1948).

We find no substance in the contention that appellant was not aware of the topic and subject under inquiry.

(3) While appellant challenged the Subcommittee's authority, he did not, as we have noted, ask that the subject be stated. Nor did he object to the questions on the grounds of pertinency. In response to a challenge to the authority of the Subcommittee the Chairman advised appellant that the questions were directed at whether he was a part of the Communist conspiracy[15] then under

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role of government to be a watchdog over the press. Let the reader at his breakfast table be the judge of whether a paper suits him or not, and by extension, whether the men who produce that paper suit him." S. Rep. No. 1934, 84th Cong., 2d Sess., 15, 16 (1956).

[15] See Barsky v. United States, 83 U.S.App.D.C. 127, 167 F.2d 241, *cert. denied*, 334 U.S. 843 (1948).

investigation. The second count question involved whether he had any knowledge as to a Communist attempt to infiltrate Typographical Union No. 6, and whether he had ever discussed with Matilda Landsman the question of Communist activity in that union. Matilda Landsman was known to the Subcommittee as an employee of the New York Times who had, on directions of the Communist Party "downgraded" her job from news work to the press room in order to carry out "missionary" or "colonizing" work in the typographical employees. We hold that the pertinency of the questions was revealed by their context and that no additional explanation of pertinency was called for absent an objection to the question on that ground. No particular form or words are required to raise that objection but the interrogators must in some way be made aware that the witness objects to or is in doubt about the relationship of the question to the subject under inquiry. Applicant failed to do this, hence there was no duty on the Subcommittee to say more.[16]

Moreover the *Watkins'* standard on this score is qualified:

> *Unless* the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, *upon objection* of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. (Emphasis added.) 354 U.S. at 214-15.

This definition makes plain that if the subject matter has been made clear no explanation need be given, absent objection or request. In other words, *two* things must coincide to require an explanation as to pertinency: (1) that the subject matter be *unclear*, and (2) the witness must object.

(4) Essentially appellant argues that as a newspaper-

[16] We note in passing that with respect to certain questions at both the executive and public sessions appellant frequently made objections explicitly on pertinency grounds. See S. Rep. No. 1934, *Supra* note 14, at 4, 8, 13, 18. None of these questions formed the basis of his conviction.

man he has a special immunity from questions as to possible membership in the Communist Party. He argues that this investigation was directed at his newspaper to discourage all "newspapers from hiring persons of unpopular, unorthodox or minority views and associations . . . ." This, it is argued, results in "elimination of persons from the press who hold or once held unorthodox, unpopular or minority views or associations [and] is as effective a form of censorship as the deletion of the material they contribute to the press." Appellant's Brief, p. 32. This First Amendment argument is, in large part, that any inquiry such as this, directed to a member of the press is an impairment of the freedom of the press because it tends to intimidate all those engaged in that activity. But this inquiry was in no sense an investigation into the press as such, but into the question whether the constitutionally guaranteed freedom of the press was being used to undermine that very freedom and the foundation on which it rests. *Barenblatt* authorizes such inquiry. The investigatory power of Congress flows from the right of the government to preserve itself and its institutions. The important right of the press to be free and independent is not impaired by an inquiry into possible abuse of the right which is directed at destroying the very freedom the First Amendment assures. Indeed in the *Barenblatt* opinion in response to a similar argument the Court sharply pointed out that "investigatory power in this domain is not to be denied Congress solely because the field of education is involved." 360 U.S. at 129. Similarly, appellant's profession as a newspaperman does not preclude inquiry into his activities as a possible member or in behalf of the Communist Party. See *Barsky* v. *United States, supra.* Inquiry into generally protected areas must be subject to careful judicial scrutiny but the rights are not protected absolutely and they must yield to the superior right of Congress to know whether there is a dangerous abuse of those rights.

(5) Appellant urges that his conviction must be reversed because the indictment did not specifically recite the "question under inquiry." No authority has been cited

which suggests that Rule 7(c), FED. R. CRIM. P., requires an indictment under the statute to recite details of the authority and scope of inquiry.[17]

(6) Finally, appellant challenges the Subcommittee's subpoena power. The essence of this attack is that the subpoena under which appellant testified was invalid because the Committee had no reason to call appellant. This argument by its terms rests on the theory that in order to call appellant the Committee must show it had reason to believe he was or had been affiliated with or had information about Communists. Information about Communists is not the exclusive property of Communists. Many persons innocent of Communist Party connections and bitterly hostile to Communism may possess important information about such activities. Hence a belief or showing that the Committee must have reason to believe the witness is or once was a Communist or in sympathy with them is unnecessary. The second phase goes to the argument that a legislative committee has no power to employ compulsory process without some reason to believe the witness has information about the subject under inquiry. There is relatively little authority on this general subject but *United States* v. *Orman*, 207 F.2d 148, 154-5 (3d Cir. 1953), suggests that congressional committees may not subpoena private citizens at random "indiscriminately in the mere hope of stumbling upon valuable information and to cite them for contempt if they refuse to answer. . . ." The Supreme Court in *Barenblatt* noted the absence of evidence "that the Subcommittee was attempting to pillory witnesses," and absence of evidence that "petitioner's appearance as a witness follow[ed] from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee." 360 U.S. at 134.

A careful review of this record satisfies us that the authority of the Subcommittee to conduct the hearings is

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[17] Sacher v. United States, 102 U.S.App.D.C. 264, 267, 252 F.2d 828, 831 (1958), held that an indictment under this statute need not "recite details of the authority and scope of the inquiry" and that holding stands undisturbed by the Supreme Court's action in Sacher v. United States, 356 U.S. 576 (1958).

plain, that there was full awareness on the part of the appellant that the subject matter was the possible infiltration of Communists into the radio, TV, and the press, including his own paper and that the questions were plainly pertinent to the topic. There is not the slightest indication in this record of an effort or desire or a tendency to pillory the appellant or other newspaper men or to call them indiscriminately without reason. After the important revelations of Winston M. Burdett, it was surely not a "dragnet" process to call appellant as a member of the working press to check on possible Communist Party activities among his fellow employees. The proper balance between individual rights and the broad public interests at stake here must be resolved in favor of the latter.

Other errors assigned by appellant have been carefully considered but we find no error which warrants reversal.

Affirmed.

APPENDIX B

Statutes and Constitutional Provisions Involved

2 U.S.C. § 192, R.S. 102 (52 Stat. 942), as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,00 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Senate Resolution 366, 81st Congress, 2d Session, provides:

> "Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and
>
> "Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and
>
> "Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and
>
> "Whereas it is vital to the internal security of the

United States that the Congress maintain a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"*Resolved*, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

The First Amendment to the Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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No. [illegible]

In the Supreme Court of the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 246

ROBERT SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 45–56) has not yet been reported. The opinion of the District Court for the District of Columbia (J.A. 10–22; Pet. 32–44) is reported at 148 F. Supp. 926.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960 (Pet. 45). The petition for a writ of certiorari was filed on July 18, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Fourth Amendment forbids the subpoenaing of a person before a Congressional committee unless there is probable cause to believe that he possesses information relevant to the pending inquiry and, if so, whether the Internal Security Subcommittee had such information as to petitioner.

2. Whether the Internal Security Subcommittee hearings involved here infringed upon freedom of the press as protected by the First Amendment.

3. Whether petitioner was apprised and was aware of the subject under inquiry.

4. Whether a defendant, who is indicted by a grand jury composed, in part, of federal employees is entitled to dismissal of the indictment or a hearing on the basis of general allegations that such jurors are biased and afraid as the result of the government security program.

5. Whether the indictment was defective because it failed to specify the subject under inquiry.

6. Whether it was proper for the court to convict and sentence petitioner on each of two counts for his separate refusals to answer two questions.

STATUTE AND RULE INVOLVED

2 U.S.C. 192 (R.S. 102, as amended) and the pertinent provisions of Senate Resolution 366, 81st Cong., 2d Sess. (1950) are set forth in Appendix B to the petition for certiorari (Pet. 57–58).

STATEMENT

The petitioner was charged in a three-count indictment with having unlawfully refused to answer three

questions pertinent to matters under inquiry by the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary (J.A. 7). Having waived his right to trial by jury (J.A. 9), petitioner was found guilty by the district court on counts 1 and 2. Count 3 was dismissed (J.A. 21–22). Petitioner was sentenced to six months' imprisonment and to pay a fine of two hundred and fifty dollars on each of the two counts, with the sentences of imprisonment to run concurrently (J.A. 22). On appeal, petitioner's conviction was affirmed[1] (Pet. 45–56).

The pertinent facts may be summarized as follows:

On June 28 and 29, 1955, the Senate Internal Security Subcommittee received certain information from Winston Burdett, a newspaperman and broadcaster, in connection with its continuing investigation since 1950 into Communist subversion and the operation of the internal security laws (Tr. 83).[2] Burdett's testimony concerned attempts of the Communist Party to influence public opinion by infiltration of Party members into the newspaper field.[3] Subsequent to Bur-

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[1] The court of appeals delayed argument and determination of this case, along with seven other contempt of Congress cases until after the decision of this Court in *Barenblatt* v. *United States*, 360 U.S. 109. See the Government's Br. in Opp. in *Deutch* v. *United States*, No. 233, this Term, pp. 8–9.

[2] "Tr." refers to the transcript of the trial proceedings.

[3] Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, U.S. Senate [hereinafter "Hearings], 84th Cong., 1st Sess., Part 14, pp. 1323–1363.

dett's testimony, the subcommittee received information that a man by the name of "Shelton," said to be employed on the editorial or news side of the *New York Times*, was a member of a Communist group among the staff of that organization, that he was active in the affairs of this group, and that he was in a position to furnish the subcommittee with information concerning Communist activity (Tr. 44–45). The first name of the person identified as "Shelton" was not given. Although this information came to the subcommittee by letter signed with a pseudonym, the identity of the writer was known to a former counsel of the subcommittee, Robert Morris (Tr. 138). With respect to the source of the information, Julian G. Sourwine, chief counsel of the subcommittee, testified at the trial (Tr. 138):

> We had received other letters from this same individual. I knew by the appearance of the letter, the way it was typed and the pseudonym which was signed to it, that it came from this same individual who had given us leads before which proved out and concerning whom Judge [Robert] Morris had stated that he knew him and that he was a reliable person.

Still unaware of Shelton's first name, the subcommittee caused a subpoena to be issued, addressed to "Willard Shelton," at the *New York Times* in New York City (Tr. 46). This name was a mistake since Willard Shelton was not the person actually sought by the subcommittee (Tr. 46). Mr. Sourwine later concluded, after an investigation by himself, that someone in the typing section of the subcommittee staff confused the "Shelton" to be subpoenaed with one

Willard Shelton, who is likewise a newspaperman but who was not employed by the *Times* or sought by the subcommittee (Tr. 139).

The subcommittee employee who went to New York City to serve the subpoena, along with other subpoenas, soon ascertained that no Willard Shelton was employed by the *New York Times* (Tr. 46). He was told that a Robert Shelton (the petitioner) was an employee of that organization and he was the only "Shelton" on the editorial or news side (Tr. 46; 144–145). The subcommittee employee added the words "or Robert Shelton" to the subpoena and upon instructions of the subcommittee served the subpoena on petitioner (Tr. 46).

Nonetheless, between the time that the subpoena was issued and petitioner's appearance, the subcommittee (Tr. 153)—

> * * * made a thorough check of all the sources that were available to us to see what there might be on a Robert Shelton or what there might be on a Shelton who might be the Robert Shelton that we were talking [about]. And we accumulated those things from all the sources available to the committee and then attempted in the hearing to see if this was the same individual.

As part of the information available, the subcommittee had under the name Shelton (without a first name) three, four, or five "leads." As explained by Mr. Sourwine (Tr. 152–153):

> We had here a man who was Robert Shelton, who was a newspaperman. It was of some importance to the Committee, while he was on

> the stand, to ascertain whether he was the same person as any of these other individuals. It is a procedure which we follow wherever it is possible, where time will permit: we have a witness who may be the same as a person not adequately identified in our files. We ask a question or questions for the purpose of establishing that, because even if we learn that he is not, we have accomplished something in getting a little further with our investigation.

Petitioner, represented by counsel, first appeared at an executive session of the subcommittee, in New York City, on December 7, 1955. Petitioner was advised by subcommittee counsel that the purpose of the appearance was to clarify the question of identity (Tr. 50). Upon being queried as to Communist Party membership, petitioner immediately responded that he had a statement to read to the subcommittee (Tr. 52). The statement, which was then read, objected in substance to the subcommittee's inquiry into petitioner's Communist Party membership on the grounds that the subcommittee lacked jurisdiction and the inquiry infringed his rights under the First Amendment (Tr. 52–56).

In view of petitioner's attitude, Counsel Sourwine suggested that the subcommittee might wish to pursue its questioning at a future session (Tr. 58–59). Petitioner was therefore recalled, and appeared in open session in Washington, D.C., on January 6, 1956 (Tr. 75–76). At the outset of the January 6, 1956, hearing, petitioner interposed several objections to his having been called before the subcommittee. These objections included: an objection to the juris-

diction of the subcommittee on the ground that petitioner's testimony in executive session made clear that no information would be obtained relating to the subcommittee's legislative purpose; the claim that questioning "might subject me to prosecution in violation of my right to be tried in the community where I work and live"; and the statement that he did not "see why I am involved in this hearing, which the chairman said on Wednesday, stems from the Burdett testimony. There was no reference to me in the Burdett testimony nor in the testimony of Clayton Knowles" (Tr. 105–106). In this last objection, petitioner showed that he was aware of the opening statement of the Chairman of the subcommittee on January 4, 1956, which set forth the subject under inquiry as Communist infiltration into the newspaper field in order to allow the international Communist conspiracy to carry on its "psychological warfare against the United States" Hearings, pt. 17, p. 1587.

In the course of the hearing, petitioner was asked: "Are you, sir, a member of the Communist Party, U.S.A.?" (Tr. 109). After consultation with his counsel, petitioner said that "I decline to answer on the grounds of the First Amendment and challenge to the jurisdiction of the Committee" (Tr. 110). He was then permitted to read a lengthy statement in which he restated his refusal to answer the question on the basis of the First Amendment and due to the lack of jurisdiction of the subcommittee (Tr. 111–119). These objections were overruled by the Chair-

561018—60——2

man, who ordered him to answer the question (Tr. 119). Petitioner persisted in his refusal to answer the question (Tr. 119) and Count 1 of the indictment is predicated upon this refusal (J.A. 8).

Later in the hearing, petitioner denied "any knowledge respecting a Communist attempt to take over control of Typographical Union No. 6" and further denied having "discussed with Matilda Landsman the question of any Communist activity in that union" (Tr. 123). As disclosed at the trial Matilda Landsman was believed by the subcommittee to be an employee of the *New York Times* in the typographical department who was a member of Typographical Union No. 6 and of the Communist Party (Tr. 68). Following these denials by petitioner, he was then asked (Tr. 123):

> Now for the purpose of testing the credibility of that answer, sir, I will ask you, did you ever have any conversation with Matilda Landsman?

Petitioner refused to answer this question on the grounds set forth in his prepared statement which had previously been read. The Chairman ordered petitioner to answer the question on penalty of contempt of the Senate, but petitioner persisted in his refusal (Tr. 124). Count 2 of the indictment is predicated upon this refusal (J.A. 8).

ARGUMENT

1. Petitioner urges (Pet. 21–25) that the subpoena issued to him violated his rights under the Fourth Amendment because the subcommittee did not have probable cause to believe that he possessed informa-

tion relevant to the pending inquiry. This contentio is without substance. First, petitioner, while statin that he did not see how he was involved in the sub committee's investigation when he appeared befor the subcommittee (Tr. 105–106), raised no objectio to the subpoena on the ground of the Fourth Amend ment. Petitioner could therefore not raise this issu for the first time at his trial. Cf. *United States* v *Bryan*, 339 U.S. 323, 327–335.

Second, even assuming *arguendo* that there is suc a constitutional requirement of "probable cause" unde the Fourth Amendment, the record demonstrates—an the district court found (Pet. 40)—that the subcommi tee had sufficient reason to examine petitioner as to h knowledge of the presence and activities of Communis in the newspaper business in New York (see the Stat ment, *supra*, pp. 3–5). The subcommittee knew th the Communist Party was trying to infiltrate the new paper field and had been informed by a reliable sour that a person named Shelton who was a member of Communist group was working on the editorial or ne staff of the *New York Times*. The fact that the su committee did not know the first name of petition does not detract from the fact that it had a reasonab basis for believing that the only Shelton employed the editorial or news staff of the *Times*, whatever h first name, possessed information of use to the subco mittee in its investigation of Communist activiti And, even if the constitutional right petitioner clai does in fact exist, certainly Congressional committe must have broad discretion as to what witnesses call, and only in the clearest of cases, if at all, shou

the mere issuance of the subpoena be called in question in the courts.

Moreover, while the Fifth and First Amendments[4] protect witnesses who appear before Congressional committees, neither the language of the Fourth Amendment nor the decisions of this Court suggest that the scope of the Amendment extends to subpoenas to testify. On the contrary, the Amendment makes clear that it was intended to protect "persons, houses, papers, and effects" from improper search or seizure, and not, like the Fifth Amendment, to protect witnesses from being forced to testify. This Court has never held that the Fourth Amendment is relevant to subpoenas requiring witnesses to appear and testify. In *Boyd* v. *United States,* 116 U.S. 616, and the other cases cited by petitioner (Pet. 23–24), the Court decided that the Fourth Amendment applies to subpoenas *duces tecum* because the "compulsory production of a man's private papers" "accomplishes the substantial objects of [the] acts" of "forcible entry into a man's house and searching amongst his papers". 116 U.S. at 622. In contrast, the requirement that a person appear briefly before a Congressional committee does not accomplish the

[4] If "petitioner's appearance as a witness follow[ed] from indiscriminate dragnet procedures lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee," he might be freed from being required to answer the questions involved here by the First Amendment. See *Barenblatt* v. *United States*, 360 U.S. 109, 134. Petitioner's First Amendment contention is discussed *infra*, pp. 11–13.

substantial object—or interfere with his right to the same extent—as seizure of his person by arrest.[5]

2. Petitioner contends (Pet. 28–29) that the subcommittee's investigation violated freedom of the press protected by the First Amendment since in fact the subcommittee was investigating the press, not Communist infiltration into it. Insofar as petitioner's contention depends on his claim that the subcommittee was not investigating Communist infiltration into the press, it is squarely contradicted by the findings of the district court (Pet. 42–43) and the record. All the questions asked petitioner were either directly related to Communist activities or were preliminary inquiries intended to lead up to such questions. After petitioner had testified, the subcommittee asked other members of the press similar questions concerning Party activities. In addition, the record shows that the questions were not a mere fishing expedition, as the subcommittee had information that Communists had infiltrated into the press (see the Statement, *supra*, p. 3) and this information was confirmed by testimony taken the same day as petitioner appeared (Hearings, pt. 17, pp. 1732, 1739, 1777, 1791).

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[5] Petitioner quotes (Pet. 23) a very broad statement of the coverage of the Fourth Amendment from Mr. Justice Brandeis' dissenting opinion in *Olmstead* v. *United States*, 277 U.S. 438, 478. But this statement is directed at physical invasions of privacy or their equivalent such as wire-tapping—which was the action involved in that case—since it is based (see 277 U.S. at 477–478, and notes 4–10) on a synopsis and citation of cases involving actual physical invasion of privacy (*e.g.*, *Weeks* v. *United States*, 232 U.S. 383, or improper use of subpoenas *duces tecum* which this Court has held has substantially the same effect as a physical invasion (*e.g.*, *Boyd* v. *United States*, *supra*).

Since the subcommittee was investigating not the press as a whole, but Communist infiltration into it, it is clear that petitioner's reliance on the First Amendment is misplaced. First, Congressional committees can investigate Communist infiltration of the press, just as they can inquire into Communist infiltration in the field of education (*Barenblatt* v. *United States*, 360 U.S. 109, 125–134),* an area likewise protected by the First Amendment. As the court below stated (Pet. 54):

> * * * The investigatory power of Congress flows from the right of the government to preserve itself and its institutions. The important right of the press to be free and independent is not impaired by an inquiry into possible abuse of the right which is directed at destroying the very freedom the First Amendment assures. * * *

Second, this subcommittee, as part of its investigation of Communist infiltration of the press, could properly call petitioner to testify before it. In subpoenaing petitioner, it is plain that the subcommittee was not engaging in "indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee." *Barenblatt* v. *United States*, *supra*, 360 U.S. at 134. On the contrary, as we have shown (*supra*, pp. 3–5, 9), the subcommittee had a reasonable basis for believing that the only Shelton employed on the editorial or

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* Earlier, this Court had held that the press, like other business, is not protected by the First Amendment from general, nondiscriminatory legislation and investigations. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186.

news staff of the *Times* possessed information of use to the subcommittee in its investigation of Communist activities in the press.

3. Petitioner claims (Pet. 25–28) that he was not adequately apprised by the subcommittee of the subject under inquiry so that he could determine whether the questions asked him were pertinent to this subject. But petitioner failed to raise the issue of pertinency at the time the questions were asked so as to "trigger what would have been the Subcommittee's reciprocal obligation had it been faced with a pertinency objection." *Barenblatt* v. *United States, supra,* 360 U.S. at 124. While he did state as one of his general objections that "[I fail to] see why I am involved in this hearing" since no prior witnesses had mentioned him (see the Statement, *supra,* p. 7), this does not appear to be the kind of clear objection to pertinency required by this Court in *Barenblatt.* Moreover, this objection was made prior to being sworn, before any questions had been asked, and was not repeated as to either question which was the subject of petitioner's conviction. Instead, petitioner orally stated, after consultation with counsel, that he objected to the question whether he was a Party member on the grounds of the First Amendment and the subcommittee's lack of jurisdiction. The lengthy statement which he read to the subcommittee after being asked this question and which he also invoked after being asked whether he had talked with Matilda Landsman raises only these same two grounds. And petitioner explicitly told the subcommittee that the grounds given in the written statement were the only ones he was raising (see the

Statement, *supra*, pp. 7–8). Petitioner's omission of any objection as to pertinency is significant since, in response to two other questions asked by the subcommittee, he specifically objected on the ground of pertinency (Tr. 108; 125). Thus, petitioner knew how to object to the pertinency of particular questions but, apparently because he understood the pertinency of these two particular questions, deliberately did not raise this objection as to them.

In any event, the record supports the finding of fact of the district court (Pet. 41–42, 43), which was affirmed by the court of appeals (Pet. 50–52), that petitioner was apprised and was aware of the subject of the hearing at which he appeared. Having been subpoenaed to testify on January 6, 1956, petitioner was presumably in the room when, only moments before he himself was called, Senator Hennings, a member of the subcommittee, stated (Tr. 93):

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts, or indeed, all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication.

At the beginning of his own testimony, petitioner indicated that he had heard or read (1) the subcommittee Chairman's opening statement at the hearings two days earlier at which he had stated that the subject of the hearings was Communist infiltration into

the newspaper field[7] and (2) the testimony of two witnesses on this same subject.[8]

4. Petitioner claims (Pet. 29–30) that the indictment should have been dismissed or a hearing granted due to the possible "fear and bias" of members of the grand jury who were federal employees. This argument, which is without substance, is answered in our brief in opposition in *Russell* v. *United States*, No. 239, this Term, pp. 5–8, pending on petition for a writ of certiorari, to which we respectfully refer the Court.

Petitioner, like the defendant in *Russell*, completely failed to show or even allege the strong, individual, and specific facts of bias necessary to dismiss the indictment or obtain a hearing. In fact, unlike Russell, he did not even offer proof that government employees *in general* were so intimidated by the government security program that they were biased in Communist cases. Instead, he broadly claims that

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[7] Petitioner argues (Pet. 26–27) that the bill of particulars makes the subject under inquiry that stated in the resolution authorizing the Senate Judiciary Committee, not the lesser inquiry of Communist infiltration in the newspaper field, and that this declaration is binding on the government. In fact, however, the "bill of particulars" refers to an oral statement made by the Assistant United States Attorney before the district court which was made in reference to the authority of the subcommittee rather than to pertinency or the subject under inquiry (J.A. 5–6). It is perfectly consistent with this statement for the government to claim and prove that the actual subject under inquiry when petitioner appeared as a witness was narrower than the entire area which the full Committee and subcommittee were authorized to investigate.

[8] See the Statement, *supra*, p. 7, and the testimony of Winston Burdett and Clayton Knowles, Hearings, pt. 14, pp. 1323–1363; *id.* pt. 17, pp. 1635–1645.

the mere presence of government employees on the grand jury made the indictment invalid, or, alternatively, that he had the right to interrogate all the employee-grand-jurors in order to show their fear and bias. Certainly, petitioner has no such right to conduct a sweeping investigation into the attitudes and psychology of all these jurors on the basis of merely his hope of finding something more definite.

5. Petitioner argues (Pet. 29) that the indictment was defective because of its failure to specify the "question under inquiry." Since the indictment (J.A. 7) was in this respect precisely the same as that in *Russell* v. *United States*, *supra*, No. 239, this Term, we respectfully refer the Court to our brief in opposition in that case (pp. 8–10).*

6. Lastly, petitioner contends (Pet. 30) that the district court erred in fining petitioner separately on two counts. But under 2 U.S.C. 192 each refusal to answer a pertinent question is a separate offense. Moreover, the record in this case does not suggest any attempt by the subcommittee to multiply contempts. Petitioner made no general refusal to answer all questions, or even all questions in a particular area; in fact, the question forming the basis of count two

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*As in *Russell*, it is clear that petitioner was not left in doubt at trial as to the subject under inquiry, since the record shows that petitioner knew the subject at the time of the hearing (see *supra*, pp. 14–15).

(J.A. 7–8) was asked for the purpose of testing the credibility of a previous answer given by petitioner.[10]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1960.

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[10] Petitioner states (Pet. 21, 31) that certiorari should be granted because the issues raised in this petition are now before the Court in *McPhaul* v. *United States*, No. 33, this Term, certiorari granted, 362 U.S. 917; *Wilkinson* v. *United States*, No. 37, this Term, certiorari granted, 362 U.S. 926; and *Braden* v. *United States*, No. 54, this Term, certiorari granted, 362 U.S. 960. One of the issues raised by petitioner—whether the indictment must specify the subject under inquiry—is also involved in *Braden*. But while we cannot, of course, know the reasons why the Court granted certiorari in that case, we believe that this issue is without substance, being controlled by clear judicial precedent, and is distinctly subsidiary to the more serious issues involved in *Braden*. Although contentions as to whether the subcommittee adequately apprised the witness of the subject under inquiry and as to his rights under the First Amendment are also raised in the three pending cases, determination of these issues, in view of this Court's holding in *Barenblatt* (see 360 U.S. at 123–124, 127–134), depends on the particular facts of each case.

U.S. GOVERNMENT PRINTING OFFICE 1960

SUPREME COURT, U. S.

No. 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 196

ROBERT SHELTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 246

ROBERT SHELTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

One would have hoped that the United States Government, in a case involving a six-month prison sentence for a young newspaperman untainted by any previous brush with the law, would have leaned over backwards to present the case fairly to this Court. Even if petitioner's case cannot be deemed sufficiently compelling to evoke a confession of error from the Government, it certainly does not deserve the misleading response which the Government has now filed. More in sorrow than in anger that the Govern-

ment should place "victory" above justice, we encroach upon the Court's time in this reply memorandum to call attention to two totally misleading contentions on vital points in the Government's opposition to certiorari.

I

The Government pitches its entire argument that there was probable cause to call petitioner as a witness on the ground that the Subcommittee "had been informed by a reliable source that a person named Shelton who was a member of a Communist group was working on the editorial or news staff of the *New York Times*" (p. 9). But there is not one single, solitary shred of evidence to support this statement;[1] what the Government seeks to accomplish by the quoted statement is to have this Court assume the existence of an alleged "letter" without considering petitioner's successful challenge to its existence.

At the trial, Mr. Sourwine testified about an anonymous "letter" and this was the Government's case on probable cause. But Sourwine's testimony, as pointed out in the Petition (pp. 10-11), was conflicting and inherently unbelievable[2] and on top of this Sourwine refused to produce the "letter." In view of this, the District Judge had to, and did, refuse to find that the "letter" existed and to rely upon its existence; instead, he held that probable cause

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[1] That an alleged "letter" was the only information the Subcommittee even claimed to have appears from Mr. Sourwine's testimony that "the anonymous letter was all that we had about this individual . . ." (Tr. 153); that this "letter" is not before the Court is demonstrated in the Petition (pp. 8-15).

[2] One incredible inconsistency is worth repeating here. Sourwine testified at the trial that the Subcommittee had information (from the "letter") "that this man named Shelton *was* a member of the Communist group in the New York Times" (Tr. 45). But, if they had had such a letter, why did Sourwine say at the first hearing that "The record will show that the witness *was not* charged with being a Communist" (Tr. 58)? (Emphasis supplied)

was not required and then added, as an afterthought, that probable cause could be found in the Subcommittee's information of "Communist infiltration into . . . elements of the New York newspapers, including the one by which defendant was employed" (Petition, p. 40). Nor did the Court of Appeals rely upon the alleged and unproduced "letter"; it left unclear the question whether probable cause was required and simply answered petitioner's arguments on probable cause with the statement that the Subcommittee could call petitioner "as a member of the working press to check on possible Communist Party activities among his fellow employees" (Petition, p. 56).

The posture of the case in this Court is thus quite remarkable. The Government has jettisoned the arguments of both lower courts that probable cause for calling petitioner could somehow be found in Communist infiltration of "New York newspapers" or the "working press" generally without regard to the question whether the Subcommittee had any information concerning petitioner. Now the Government stakes its argument on the existence of probable cause upon a "letter" which it will not produce and upon which neither of the courts below was willing to rely. Without so much as mentioning or answering a single one of petitioner's contentions that the "letter" did not exist and could not be considered as probable cause without being produced (Petition, pp. 8-15), the Government simply proclaims to this Court out of thin air that the Subcommittee "had been informed by a reliable source that a person named Shelton who was a member of a Communist group was working on the editorial or news staff of the *New York Times*" (p. 9). The Government, in a word, is asking this Court to assume the existence of the "letter" without knowing the Government's answers, if any, to petitioner's contentions, without petitioner having the right

to respond to those answers, if there are any, and in the face of petitioner having persuaded both lower courts that they could not reply upon the alleged "letter."

The Government suggests, too, that the Fourth Amendment does not extend to subpoenas to testify (pp. 10-11).[3] Although the cases cited in the Petition (pp. 23-25) appear to reject the Government's distinction between a subpoena to testify and a subpoena to testify and bring along a single sheet of paper, the relevant consideration for present purposes is the Government's concession *sub silentio* that the applicability of the Fourth Amendment to Congressional Committee witnesses is a question of substantial importance.

II

Even more misleading than its sleight-of-hand reliance upon the alleged but unproduced "letter", is the Government's answer to petitioner's argument predicated upon the bill of particulars. Petitioner argued that (Petition, pp. 18, 26-28), since the Government had given petitioner a bill of particulars that the full authorizing resolution of the Subcommtitee was the question under inquiry, it could not, as it tried to do, rely upon a lesser or different question under inquiry at the trial or on appeal. The Government, having no possible answer to petitioner's contention,

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[3] The Government weakly suggests that petitioner "raised no objection to the subpoena on the ground of the Fourth Amendment" (p. 9). We do not believe that *United States* v. *Bryan*, 339 U.S. 323, requiring a witness to raise the absence of a quorum (which could be remedied on the spot) is any precedent for requiring a witness to raise the issue of probable cause (which could not be so remedied). At any rate, the petitioner did raise the question of probable cause in dramatic terms at the opening of the hearing when he said "I fail to see why I am involved in this hearing . . ." (Tr. 105). Also in his prepared statement which he read at the hearing, petitioner said, "I am involved in these hearings as a victim of accident" (Tr. 114). Short of using the legal words "Fourth Amendment" or "probable cause," we wonder what better phrase petitioner, a layman, could have used.

just states that there was no such bill of particulars. Its statement on this score is worth quoting in full (p. 15, n. 7):

> "Petitioner argues (Pet 26-27) that the bill of particulars makes the subject under inquiry that stated in the resolution authorizing the Senate Judiciary Committee, not the lesser inquiry of Communist infiltration in the newspaper field, and that this declaration is binding on the government. In fact, however, *the 'bill of particulars' refers to an oral statement made by the Assistant United States Attorney before the district court which was made in reference to the authority of the subcommittee rather than to pertinency or the subject under inquiry* (J.A. 5-6). It is perfectly consistent with this statement for the government to claim and prove that the actual subject under inquiry when petitioner appeared as a witness was narrower than the entire area which the full Committee and subcommittee were authorized to investigate." (Emphasis supplied)

This statement is misleading in two respects: In the first place, the Government's statement suggests that only an "oral statement" rather than a "bill of particulars" was given. But the Joint Appendix is crystal clear to the contrary. After petitioner's motion to dismiss the indictment was denied (J.A. 5), counsel for petitioner asked for "*a bill of particulars*" and Government counsel stated flatly, "I will waive written notice of *the bill of particulars*" (J.A. 5). (Emphasis supplied) Thereafter, Government counsel gave such a bill of particulars (J.A. 5-6) and the District Court stated that "*the Government has supplied the bill of particulars orally*" (J.A. 6). (Emphasis supplied) For the Government now to suggest that there is some difference between this "oral statement" and a "bill

of particulars" is to put every defendant on notice that he can never safely accept an oral statement in open court as a bill of particulars even when the District Court and Government counsel both call it a bill of particulars.[4]

Secondly, the Government's statement bluntly asserts that the bill of particulars "was made in reference to the *authority of the subcommittee* rather than to pertinency or the *subject under inquiry*" (Emphasis supplied). This statement is not misleading; it is palpable error. Petitioner's counsel asked for a bill of particulars on both the authority of the Subcommittee and the question under inquiry in these words:

> "Mr. Silard. The request of the bill is for the same information as the first point of our motion to dismiss, that is, for the specific authority under which the subcommittee was said to be conducting hearings and, secondly, for the *nature of the question under inquiry* before said committee" (J.A. 5). (Emphasis supplied)

Government counsel, after giving the authority of the Committee (J.A. 5-6), went on as follows:

> "As to the *second asking,* the Government contends, and the indictment states, that the inquiry be-

[4] The Government's argument becomes even more shocking when laid alongside of another of petitioner's contentions. Petitioner argued (Petition, p. 29) that the indictment was defective because of its failure to specify "the question under inquiry." In response (p. 16), the Government refers the Court to its argument in *Russell* v. *United States*, No. 239. In its *Russell* opposition, the Government, arguing against the necessity for pleading the question under inquiry in the indictment, states that "if petitioner was left in any doubt, he could easily have moved for a bill of particulars" (p. 10). Petitioner, having done exactly what the Government suggests—having obtained a bill of particulars on the question under inquiry—the Government now seeks to annul its binding effect. Certainly the Government cannot have it both ways—either the indictment must contain the question under inquiry or a bill of particulars supplied by the Government must bind the Government as though included in the indictment.

ing conducted was pursuant to this resolution. *We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.*

"This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose so that, in that sense, *the asking No. 2 of counsel will be supplied by his reading the resolution*" (J.A. 6). (Emphasis supplied).[5]

Thus, it is perfectly clear from the Joint Appendix that, instead of an oral statement concerning the authority of the Subcommittee, as the Government states, there was actually a bill of particulars that the question under inquiry was the full scope of the authorizing resolution. This bill of particulars thus settles the case against the Government for it does not even suggest that the full authorizing resolution (Petition, pp. 57-58) could possibly have the specificity to stand as a question under inquiry against which pertinency is to be tested. See *Watkins* v. *United States*, 354 U.S. 178, 209. And the Government's argument that the courts below found that petitioner was apprised of the question under inquiry falls in the face of the fact that the courts below found more limited questions under inquiry than the bill of particulars by which they and the Government were both bound.[6]

So the Government is forced back upon its desultory

---

[5] It should be noted that Shelton was tried before this Court's *Watkins* decision. At that time the Government took the position that the Committee had no duty to "state for the record the subject under inquiry . . . and the manner in which the propounded questions are pertinent thereto." *Watkins* v. *United States*, 354 U.S. 178, 214-215.

[6] Although the petition for certiorari (pp. 17-20) sets forth six different possible questions under inquiry asserted by one or more Senators, by Sourwine, by Government counsel, and by the courts, the Government even now refuses to disclose to this Court just what it deems to be the question under inquiry of which petitioner was supposed to be apprised. If the Government even now cannot determine what the question under inquiry was, it seems a little too much to expect petitioner to have figured it out at the hearing.

argument that petitioner failed to raise the issue of pertinency. But, prior to being sworn at the hearing, petitioner challenged the "jurisdiction of the committee" on the ground that "the committee will obtain no information from me that could possibly assist it in any legislative purpose" and added, "I fail to see why I am involved in this hearing, which the Chairman said on Wednesday stems from the Burdett testimony" (Tr. 105). Petitioner reaffirmed this challenge to the "jurisdiction of the committee" repeatedly, including when asked the questions for which he was cited (Tr. 109-111, 124). What more could petitioner have said except to use the exact word "pertinency"; certainly a layman is not held to the standard of a lawyer's pleading in stating what he obviously has in mind.[7]

[7] It must always be remembered that petitioner had to make this objection in his own words rather than through his counsel. Lawyers are not allowed to make objections for their clients at hearings of the Subcommittee. While the witness and his lawyer may hold a whispered consultation during the course of the hearing, the final words that come out are those of the witness not of the lawyer. Holding the witness to the standard of a legal objection is to require a layman to do a lawyer's work. Furthermore, if technically-perfect objections are going to be required for a witness to avail himself of the *Watkins* rule, it would appear to be a denial of the right to counsel to require the witness to phrase the objection in his own words.

Conclusion

Wherefore, it is respectfully submitted that certiorari should be granted and the case set for argument with *McPhaul*, *Wilkinson*, and *Braden*.[8]

Respectfully submitted,

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(1767-3)

[8] The Government concedes that the issues at bar substantially overlap those in *McPhaul*, *Wilkinson* and *Braden*, but argues that each case "depends on the particular facts" (p. 17, n. 10). Certainly the compelling facts here involved present an apt vehicle for the resolution of the admittedly overlapping issues.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

ROBERT SHELTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 246

ROBERT SHELTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER *

The Supplemental Memorandum for the United States first confesses that its Brief in Opposition "was incorrect" (p. 2) and in "error" (p. 3) and then proceeds to repeat and compound the error. The government admits (pp.

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* This Memorandum was originally filed in multilith form on October 1. The Government's Supplemental Memorandum was not received by petitioner until 5:00 P.M. Thursday, September 29th, some five weeks after the filing of petitioner's memorandum pointing out the error which the government now concedes. Since it was necessary to file this memorandum prior to the Court's consideration and decision on the petition for certiorari, there was insufficient time for printing prior to filing.

2-3) that the Assistant United States Attorney did provide a bill of particulars that the "question under inquiry" was the full scope of the authorizing resolution and not a smaller, more limited inquiry. Having admitted that much, we are at a total loss to understand the government's last-minute contention that this bill of particulars was somehow "not binding on the government so as to restrict the exact subject under inquiry which the government intended to prove" (p. 4) and its return to its earlier characterization of the bill of particulars as "the prosecutor's oral statement as to the subject of the inquiry" (p. 5). But whatever the government may be trying to say in its desperate effort to escape its own bill of particulars,[1] its admission that there was a bill of particulars that the question under inquiry was the full scope of the Committee's resolution and nothing less, demonstrates at the very least the following four points:

1. The government's concession that the Assistant United States Attorney gave a bill of particulars that the question under inquiry was the full Committee resolution and not a smaller, more limited inquiry concedes away the government's argument that petitioner was aware of such a smaller, more limited inquiry, at the hearing before the Committee. The Assistant United States Attorney gave his bill of particulars after full consultation with the members and counsel for the Committee and the bill of particulars which he gave certainly reflected the question under

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[1] It should be noted that the quotation from the Assistant United States Attorney on which the government relies in its effort to escape the bill of particulars (p. 4), is from his argument opposing the Motion to Dismiss, *not* from the bill of particulars. Even if it had been given as part of the latter, however, it could not have affected the Assistant United States Attorney's direct, particular and explicit statement that the Committee resolution and no more limited inquiry was the question under inquiry.

inquiry the Committee deemed before it at the time of the hearing. Petitioner can not fairly be charged with being aware (Gov't. Supp. Memo, p. 3) of another more limited question under inquiry at the hearing in the face of the governmental admission that the question under inquiry was the full resolution and *not* the more limited question of which petitioner was supposed to have been aware.[2]

2. The government's contradiction in this Court of its own bill of particulars on the question under inquiry in the trial court illustrates far better than anything we can say the importance of strict adherence to the *Watkins* rule. Here the government affirms that the Assistant United States Attorney gave a bill of particulars setting forth one question under inquiry and then goes on stubbornly to assert a different question under inquiry. "Certainly, if the point is that obscure after trial and appeal, it was not adequately revealed to petitioner when he had to decide at his peril whether or not to answer." *Watkins* v. *United States*, 354 U.S. 178, 214. We do not see how it can be indisputably and contemporaneously clear to a lay witness that the Committee is interrogating him on a precise and narrow subject of inquiry when, after extensive preparation of the trial and examination of the printed hearings, it is equally clear to the government's expert counsel that there was no such narrowly defined subject of inquiry.

3. The government's effort to escape from its bill of particulars further validates petitioner's contention that the indictment should state the question under inquiry. We cannot believe the government would have sought to play as fast and loose with an indictment as it is now seeking

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[2] The government apparently concedes that the full resolution cannot stand as a sufficiently precise "question under inquiry" against which to measure pertinence. This point was made in the petition (pp. 27-28) and no answer is suggested either in the government's Brief in Opposition or in its Supplemental Memorandum.

to do with a bill of particulars. Indeed, the government concedes as much (p. 5, n. 3), as it must in view of *Stirone* v. *United States*, 361 U.S. 212.

4. Finally, nothing could have been more prejudicial than what happened here. Under the statute, the government had to prove *beyond a reasonable doubt* the pertinence of the unanswered questions to the question under inquiry. *Quinn* v. *United States*, 349 U.S. 155, 165; *Bowers* v. *United States*, 202 F. 2d 447, 452. Petitioner's "pertinence" defense was predicated upon the fact that the question under inquiry was the full resolution. Indeed, when petitioner's counsel made his argument to the District Court as the trier of the facts (Tr. 291), he expressly argued to the Judge, on the basis of the bill of particulars, that he had "to find these questions pertinent to . . . the full scope" of the resolution (Tr. 292), and the Court asked counsel to "particularly direct" his argument to this point (Tr. 292). Yet, the District Judge, urged on by the government in flagrant disregard of its bill of particulars, found beyond a reasonable doubt that the unanswered questions were pertinent to a wholly different "question under inquiry." We can think of nothing more prejudicial than conviction for a crime different from that which the government has judicially elected to prove against the defendant.

Conclusion

We respectfully suggest that this case presents an unusually apt vehicle for elucidation of the various problems which have arisen on the "question under inquiry" point in the *Watkins* case.

We would further respectfully suggest that the government's Supplemental Memorandum (p. 1) concedes the absence of any factual basis for probable cause in summoning petitioner, leaving its sole reliance upon the contention that

the Fourth Amendment does not apply to subpoenas to testify. Petitioner's detailed demonstration (Reply Memorandum for Petitioner, pp. 2-4) that the Sub-committee had no information whatever concerning petitioner is met by stony silence. The government's willingness thus to rest on its argument that the Fourth Amendment does not apply to Congressional subpoenas to testify presents a question of substantial importance for this Court's review.

WHEREFORE, it is respectfully submitted that certiorari should be granted and the case set for argument with *McPhaul*, *Wilkinson*, and *Braden*.

Respectfully submitted,

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OCTOBER 5, 1960.

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In the Supreme Court of the United States

OCTOBER TERM, 19[illegible]

ROBERT SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 246

ROBERT SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted to clarify a footnote in the Government's Brief in Opposition (p. 15, fn. 7) which has been discussed in Petitioner's Reply Memorandum (pp. 4–8). We will therefore not address ourselves to petitioner's contentions, in his Reply Memorandum (pp. 2–4), concerning the issue of probable cause raised in this case. This matter has been fully covered in the Brief in Opposition (pp. 8–11).

In its Brief in Opposition, the government (pp. 13-15) answered petitioner's contention that the subcommittee had not apprised petitioner of the subject under inquiry. The government contended (1) that petitioner had failed to make a clear objection to the pertinency of the questions which he refused to an-

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swer as required by *Barenblatt* v. *United States*, 360 U.S. 109, 124, and (2) that the record of the subcommittee hearings fully supported the finding of the district court, which was affirmed by the court of appeals, that petitioner was aware at the time he appeared before the subcommittee that the subject under inquiry was Communist infiltration of the press.

In a footnote (p. 15, fn. 7) the government replied to petitioner's claim (Pet. 26–27) that an Assistant United States Attorney had stated in the district court in a bill of particulars that the subject under inquiry was that stated in the authorizing resolution as to Communist activities generally, not the lesser inquiry of Communist infiltration in the newspaper field. This footnote indicated that the "bill of particulars" referred to by petitioner was actually merely an oral statement by the Assistant United States Attorney and that this statement concerned the extent of the subcommittee's authority to investigate, not the actual subject under inquiry. Petitioner, in his Reply Memorandum, challenges these parts of the footnote as "misleading" (p. 5).

We agree with petitioner that the footnote was incorrect and may have been inadvertently misleading. As petitioner points out in his Reply Memorandum and as the record shows (see the Appendix, *infra*, pp. 7–11),[1] the statement of the Assistant United States Attorney was made in lieu of a formal, written bill of

[1] The entire colloquy, as included in the Joint Appendix (pp. 2–6), is set forth in the Appendix, *infra*, pp. 7–11.

particulars. The Assistant United States Attorney specifically said that the subject under inquiry before the subcommittee was the full scope of the authorizing resolution and not a "smaller, more limited inquiry" (see the Appendix, *infra*, p. 10). His statement was devoted to the issue of pertinency and not merely to the subcommittee's authority (as we said in our Brief in Opposition).

Despite, however, the error in the Government's Brief in Opposition, we continue to emphasize that petitioner's basic contention is without substance for the reasons primarily relied upon in that brief. Petitioner did not properly raise this objection because, as the record shows, he was aware of the subject being investigated. In fact, besides the evidence cited in our original brief (pp. 14–15), petitioner's statement (which he read to the subcommittee) concerning his reasons for refusing to answer also demonstrates his awareness that the subject under inquiry was Communist infiltration of the press (see the opinion of the district court, Pet. 42). This statement is devoted almost in entirety to petitioner's objection that the subcommittee's investigation was an interference with freedom of the press.[2]

The statement of the Assistant United States Attorney at the trial did not preclude the government from introducing evidence that the subject under inquiry was Communist infiltration of the press. The

[2] Hearings Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, U.S. Senate, 84th Cong., 2d Sess., Part 17, pp. 1723–1725.

latter subject is merely one portion of the broader subject of Communist activities in general which the resolution authorizes the subcommittee to investigate. Thus, when the subcommittee is investigating the narrower problem of Communist infiltration of the press, it is simultaneously investigating the broader subject which it is authorized to investigate. The introduction of evidence on the narrower problem was therefore consistent with the statement of the Assistant United States Attorney that the subject under investigation was the full scope of the subcommittee's authority.

While the Assistant United States Attorney did state that there was no "smaller, more limited inquiry being conducted" (*infra*, p. 10), he apparently meant that the subcommittee was not *restricted* to showing any inquiry less than the full authorizing resolution. In fact, he specifically said that his remarks as to the exact subject under inquiry should not be taken to limit the scope of the government's proof at the subsequent trial (*infra*, p. 8):

> That [the subject under inquiry] is a matter of fact that will come out at the trial and the proof. [Petitioner] is not entitled to have it in advance because the authority that this subcommittee was acting under is found in the resolution which I have already referred to, and there is no particularly defined inquiry less than the full authority to which this committee was restricted at this particular hearing.

Thus, the oral statement was not binding on the government so as to restrict the exact subject under inquiry which the government intended to prove.

In any event, even if it can be said that there was a variance between the prosecutor's oral statement as to the subject of the inquiry and the proof introduced at petitioner's trial, the variance would not be a material one. The crucial question when there is such a variance is whether the defendant has been prejudiced. See *United States* v. *Costello,* 221 F. 2d 668, 675 (C.A. 2), affirmed, 350 U.S. 359; *Neal* v. *United States,* 185 F. 2d 441 (C.A. D.C.), certiorari denied, 340 U.S. 937; *Shayne* v. *United States,* 255 F. 2d 739, 743–744 (C.A. 9), certiorari denied, 358 U.S. 823; *McKenna* v. *United States,* 232 F. 2d 431, 436–437 (C.A. 8). Here, petitioner does not claim and has never shown surprise or any other basis for prejudice.[3]

CONCLUSION

It is respectfully submitted that, for the foregoing reasons and those stated in the Government's Brief in Opposition, the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1960.

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[3] The variance here, if any, was not nearly so great as that in *Stirone* v. *United States,* 361 U.S. 212. Moreover, a variance between the indictment and the proof introduced is considerably more serious than a variance between the bill of particulars or binding oral statement and such proof. The grand jury might not have been willing to return an indictment with a charge conforming to the proof actually introduced. Thus, potential prejudice is more likely to be inherent in a variance with an indictment. On the other hand, since the trial court could have allowed amendment of the bill of particulars even during the trial, substantial prejudice must be shown as to any variance with a bill of particulars.

APPENDIX

The following statements appear at pp. 2–6 of the Joint Appendix:

Mr. SILARD.

* * * * *

I would like to ask Your Honor if he feels that the indictment is nevertheless sufficient, to consider the possibility of a bill of particulars so that we may know before trial what authority this committee presumed to exercise, what the scope and nature of the grant of that authority was and what the nature of the inquiry was, because as of now we stand helpless to know what these questions were pertinent to, what the inquiry was, who authorized the inquiry, and what the scope of the authority of the committee was.

* * * * *

Mr. HITZ. Your Honor, the indictment sets out the authority for this committee to act; most particularly, Senate Resolution 366 is the resolution of Congress which expands very slightly the authority which was given to this committee, that is, the Committee on the Judiciary by the Reorganization Act of 1946. This special resolution is one which gives this committee or any duly authorized subcommittee the authority to make investigations for legislative purposes in the field of subversive activities. That can, of course, be obtained by anyone who is interested in it from the Senate of the United States.

We cite it and it can be obtained. That will, of course, outline the authority of this particular committee.

We state in the indictment that the Internal Security Subcommittee, briefly put, was the body of the Judiciary Committee which was conducting the particular hearings under the resolution which gave these powers to the full committee and, when we state in the fourth line that this subcommittee of the full committee was conducting hearings pursuant to the authority which created this power in the committee, we are, of course, stating that they were conducting hearings which properly were before that committee. That is the conclusion, of course, from what we have stated here.

When we state that the questions which were refused of answer were pertinent to the inquiry which was being conducted, we are, of course, stating these were proper questions and that it was before an inquiry which was authorized by the resolution.

The COURT. Defense counsel's point there is that you do not state what the inquiry was about.

Mr. HITZ. That is right.

The COURT. What do you say about that?

Mr. HITZ. That is a matter of fact that will come out at the trial and the proof. He is not entitled to have it in advance because the authority that this subcommittee was acting under is found in the resolution which I have already referred to, and there is no particularly defined inquiry less than the full authority to which this committee was restricted at this particular hearing.

The COURT. I notice that Count 1 attempts to indicate that the subject of communism was being inquired into. Does the resolution creating the committee and the subcommittee authorize the subcommittee to investigate communism?

Mr. HITZ. Not in so many words. In general, it does.

The COURT. The subject was within the general jurisdiction?

Mr. HITZ. Yes. It comes in part 3 of the resolution which states, "the extent, nature and effects of subversive activities in the United States" and so forth. That, of course, embraces communism.

Let us assume that the particular inquiry at the moment might have been subversive activities in the field of education. That does not limit and does not restrict the full authority that was granted to this committee by the resolution and, therefore, the committee, through this subcommittee, could make all inquiries that were authorized by it to make. For the defendant to know what particular inquiry may have been uppermost in the minds of the committee, without restricting its general authority, would be of no help because the pertinency of the question asked would be as broad as the authority which the committee had, and that is stated in the resolution itself which may be obtained, so that we say not only is the indictment sufficient as it stands to charge the offense, but it is sufficient, without further particularization, to inform the defendant of the charge that he must meet and to protect him from a second prosecution.

* * * * *

The COURT. I am not going to pass on an informal request for a bill of particulars unless the Government consents that the matter be handled that way, because the Government is entitled to notice of such an application and is entitled to give it consideration.

Mr. HITZ. I will waive written notice of the bill of particulars, if Your Honor would care to hear it orally from counsel.

The COURT. I shall be glad to hear it.

Very well, I will hear your application.

Mr. SILARD. The request of the bill is for the same information as the first point of our motion to dismiss, that is, for the specific authority under which the subcommittee was said to

be conducting hearings and, secondly, for the nature of the question under inquiry before said committee.

The COURT. What do you say about that, Mr. Hitz?

Mr. HITZ. The resolution, No. 366, provides in two places for the duties of the full committee which were authorized by this particular resolution to be carried on by any duly authorized subcommittee thereof.

In that sense, I am supplying at this moment the authority for the subcommittee named in the indictment to carry on the purposes of the full committee contained in the resolution.

We will prove, at a later time, the transfer of the authority contained in this particular resolution from the full committee to the subcommittee.

As to the second asking, the Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.

This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose so that, in that sense, the asking No. 2 of counsel will be supplied by his reading the resolution.

The COURT. It seems to the Court that the Government has supplied the bill of particulars orally.

Mr. SILARD. Except in this one sense: that I asked, in by motion to dismiss—perhaps I didn't do it well—the nature and scope of the grant to this committee. That has not been given to us.

The COURT. I think it has been sufficiently given.

I will deny the motion for a bill of particulars in view of the fact that the oral statement just made by counsel for the Government will be sufficient compliance if the motion were granted. You have the particulars.

* * * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

ROBERT SHELTON,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 9

ROBERT SHELTON,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court is reported at 148 F. Supp. 926. The opinion of the Court of Appeals is reported at 280 F. 2d 701. The opinions appear at R. 214 and 232.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 18, 1960 (R. 244). The petition for certiorari was filed on July

18, 1960 and granted on March 27, 1961 (R. 245). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

Petitioner, a copy editor on the New York Times, refused to answer certain questions at a hearing of the Internal Security Subcommittee of the Senate Judiciary Committee, for which refusal he was convicted of contempt under 2 U.S.C. §192, fined, and sentenced to six months imprisonment. The questions presented in this case are:

1. May a newspaperman subpoenaed by the Internal Security Subcommittee without probable cause or reason to believe that he has been affiliated with, or has any information about, Communists or Communism, be convicted of contempt for failing to answer questions on that subject, notwithstanding the guarantees of the Fourth, Fifth and First Amendments?

2. Was there a delimited "question under inquiry" before the Subcommittee at the time of petitioner's appearance sufficient to meet constitutional due process and statutory requirements?

3. Is an indictment which fails to set forth the "question under inquiry" sufficient under the Sixth Amendment to charge the offense of contempt under 2 U.S.C. §192?

4. Is a defendant entitled to a dismissal of an indictment or a preliminary hearing thereon when he alleges by motion and affidavit that less than twelve jurors on the grand jury which indicted him were able to exercise an independent judgment by reason of the fear engendered by operation of the government employees security programs, a fear which amounted to actual bias and prejudice against him?

Statutes Involved

2 U.S.C. § 192, R.S. 102 (52 Stat. 942), as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Senate Resolution 366, 81st Congress, 2d Session, provides:

> "Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and
>
> "Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and
>
> "Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper

or prevent effective administration and enforcement thereof; and

"Whereas it is vital to the internal security of the United States that the Congress maintain a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possession, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

The First Amendment to the Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fifth Amendment to the Constitution of the United States provides that no person shall "be deprived of life, liberty, or property, without due process of law."

Statement

A. *Background of Subcommittee Hearing*

In June of 1955 in the course of hearings on "Strategy and Tactics of World Communism", Winston Burdett, a radio commentator, testified before the Internal Security Subcommittee of the Senate Judiciary Committee (R. 71). Burdett revealed that he had been a Communist Party member in the late 1930s and early 1940s while employed by the Brooklyn Eagle, and had engaged in Communist activities at home and abroad. He named a number of persons as former fellow Communists on the Brooklyn Eagle and in the Newspaper Guild; those he named were then called and questioned by the Committee.[1]

Later in 1955, a new series of hearings was instituted involving New York newspapers, particularly the New York Times. In December, 1955, thirty-eight witnesses

[1] See Parts 14, 15 & 16, Hearings before the Senate Internal Security Subcommittee, "Strategy and Tactics of World Communism", 84th Cong., 1st Sess.

(30 of them from the New York Times) were questioned in an executive session in New York City (R. 145-47). On January 4, 1956, the Subcommittee commenced a public hearing[2] which, although described by its Chairman as a *"subsequent chapter to the Burdett testimony"* (R. 71), was principally an investigation into Communism on the New York Times or among its employees; of the eighteen witnesses called in the hearing, fifteen were persons employed, formerly employed or otherwise connected with the New York Times (R. 148-49).

It has never been clarified just how and by whom the New York Times hearing was initiated. The Subcommittee had never met to authorize the hearing, although Rule 1 of the Subcommittee's Rules states "No major investigation shall be initiated without approval of a majority of the subcommittee" (R. 140). At the opening of the January, 1956 hearing, Senator Hennings, a Subcommittee member, disclosed that there had been no prior Subcommittee authorization, stating (R. 72): "I would like to have the position of the committee, if it be the position of the majority of this committee, since the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings," and that "we have no list of prospective witnesses, nor has any offer of proof as to what their testimony is likely to be been given to this subcommittee . . ." (R. 76).

Nor has it ever been clarified how the Times witnesses actually came before the Subcommittee; indeed, it is unclear whether the witnesses had actually been subpoenaed by the Subcommittee or by Counsel Sourwine. The Times

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[2] Petitioners *Shelton*, *Whitman* (No. 10) and *Price* (No. 12) were witnesses called at the hearing. Another witness indicted for refusing to answer questions therein, was acquitted on the ground that the Subcommittee's inquiry lacked the specificity required by this Court's *Watkins* ruling. See *United States* v. *Peck*, 154 F. Supp. 603 (D.C.D.C. 1957).

itself asserted that it was Sourwine who called the tune on the witnesses (R. 104):

> "When more than fifty subpoenas were issued to people in the press, radio and other fields of communication on behalf of the committee last November, Mr. Sourwine was the only person who seemed to know anything about them. They were issued under the name of Senator Eastland, but when this reporter [James Reston] called the Senator about them, he said he did not know they had been issued, did not know the hearings had been called, and said he would have to call Mr. Sourwine to find out the facts."

Sourwine, when confronted with the Times' assertion, was unable to explain just how the subpoenas came to be issued (R. 104-105). He was even vaguer, as we shall see, when asked to explain how petitioner in particular came to be called before the Subcommittee.

B. *Petitioner's Subcommittee Appearances*

On November 14, 1955, a Subcommittee aide arrived at the New York Times with approximately thirty subpoenas for Times employees (R. 121). While none of the subpoenas was addressed to petitioner, one of them was made out to a "Willard Shelton", a nationally known columnist. On discovering that Willard Shelton was not employed by the Times, the Subcommittee aide made inquiry at the Times and was informed that there were "several" Sheltons working at the Times, including petitioner, Robert Shelton, employed on the "news side" (R. 119-24; 127-29). The information that there was no Willard Shelton on the Times but that there were several Sheltons there, including one on the news side, was communicated to Chairman Eastland through Counsel Sourwine. After some discussion Chair-

man Eastland told Counsel Sourwine, according to the testimony of the latter (R. 105-06), "Well, go ahead and tell him to come." Thereupon, on instructions from Sourwine, the Subcommittee employee, having written in the words "or Robert Shelton" on the subpoena, served it on petitioner (R. 106, 121). A new subpoena in petitioner's name alone was subsequently issued on November 23, 1955, and served on petitioner.

On December 7, 1955, petitioner appeared pursuant to the subpoena at an executive session of the Subcommittee in New York. He inquired why he had been called, and was told that the Subcommittee was "clearing up a question of identity" (R. 52). Interrogated on a number of subjects, he answered some of the Subcommittee's questions, but then refused to answer others (see R. 50-64). When petitioner first indicated that he would refuse to answer certain of the Subcommittee's questions relating to possible Communist associations or activities, Counsel Sourwine said (R. 56-57):

> "I will state, Mr. Chairman, *I am greatly surprised.* I did not expect this. We came into this as I explained to the Senators and to put on the record to clear up a question of identity. The record will show that the witness was not charged with being a Communist. Counsel said you are not a Communist and you never have been; isn't that right?
>
> "Mr. Fraenkel. Obviously that involves——
>
> "Mr. Sourwine. The question does, of course, involve the answer, but I must admit to the chairman, *I am taken by surprise.*
>
> "It may be that we shall have to question this witness more at length later." (Emphasis supplied)

Together with other Times employees, petitioner was recalled under the subpoena at the January 1956 public hearing of the Subcommittee (R. 66, 96). Prior to being sworn, petitioner made unavailing objection to the jurisdiction of the Subcommittee and asserted that: "I fail to see why I am involved in this hearing which the chairman said on Wednesday stems from the Burdett testimony. There was no reference to me in the Burdett testimony . . ." (R. 84). Subsequently petitioner stated in his renewed challenge to "the jurisdiction of the committee" (R. 87):

> "I am involved in these hearings as a victim of accident. The subpoena first served to me was originally made out in the name of a person who does not work on my paper. A committee aide, when told that there was no such person on the Times, insisted on knowing if there was anyone with a similar name employed there. There were a few, but the only one that interested your man was the sole similar name in the news department—mine. At the executive hearings the committee counsel tried without success to link me with a certain New York newspaper. He was unable to establish any connection because I never worked for the paper under discussion. Yet I have been called back here today" (R. 89).

Notwithstanding his objections and without explanation, on the insistence of Counsel Sourwine petitioner was sworn and interrogated (R. 84). He answered a number of questions, but refused to answer certain questions inquiring into possible Communist associations, and conversations with other persons (R. 85-96), on the grounds that the questioning was beyond the Subcommittee's jurisdiction and violated his First Amendment rights (R. 87-91).

C. *The Proceedings Below*

Following a Senate contempt citation, on November 26, 1956, petitioner was indicted on three counts under 2 U.S.C. § 192. He was charged with refusal to answer the following three questions at the January 1956 Subcommittee hearing (R. 1-2): (1) "Are you, sir, a member of the Communist Party, U.S.A.?"; (2) "Did you ever have any conversation with Matilda Landsman?"; and (3) "What did you tell them (your employers)?"

The trial, which resulted in conviction on the first two counts, commenced in the District Court on January 14, 1957. The two principal issues at the trial concerned (a) the presence or absence of probable cause for the Subcommittee's calling and interrogating petitioner, and (b) whether a "question under inquiry" before the Subcommittee had been sufficiently delimited at the time of petitioner's interrogation to meet constitutional and statutory requirements. We consider, in order, the facts as they emerged at the trial on these two issues:

1. *The Issue of Probable Cause*

At the commencement of petitioner's trial, in explaining a pre-trial defense subpoena for all information which the Subcommittee had about petitioner at the time it called and questioned him, petitioner's counsel stated that the major factual issue at trial would concern "probable cause" for the Subcommittee's calling and questioning of petitioner (R. 35-36, 43). Petitioner's counsel asserted that the Subcommittee's own records would prove that, at the time the Subcommittee called petitioner, it "had no information whatever about him", and that petitioner had been called "without any evidence that this was a man who had been in any way concerned with the communist movement or knew anything about it . . . he was called before

the committee, without any prima facie case or probable cause" (R. 35-36). Prosecuting attorney Hitz thereupon joined issue by asserting that no probable cause is required for a Congressional committee to subpoena anyone at all to inquire into his possible Communist affiliations. *Mr. Hitz flatly affirmed that "a man off the street could be called off the street and asked, 'Are you one of the persons that we have a duty to protect this country from?'"* (R. 40). Additionally, Mr. Hitz announced that he would not rely solely upon the proposition that no probable cause is required to subpoena a witness before a Congressional committee and inquire into his possible Communist associations; he offered to demonstrate that the Subcommittee actually possessed information when it called petitioner that he had relevant evidence on the subject of its inquiry (R. 40-42). Accordingly, the prosecution sought to demonstrate "probable cause" for the calling and questioning of petitioner, through the testimony of Counsel Sourwine.

Although Sourwine had stated in the 1955 executive hearing (R. 56) that *"the record will show that the witness [petitioner] was not charged with being a Communist"* and had asserted his surprise at petitioner's refusal to answer questions concerning Communism, at the trial Sourwine reversed himself and testified that petitioner *had been charged with being a Communist prior to the 1955 hearing.* At the trial Sourwine purported to recall information supposedly received by the Subcommittee before its 1955 hearing linking a Shelton on the Times with a Communist group on the Times (R. 48-49). According to witness Sourwine's recollection, some months before petitioner was called, a letter (signed by a pseudonym) was received from a "reliable" informant, stating that a "Shelton" on the news side of the New York Times "was a

member of a Communist group on the Times", who "would be or should be in a position to give the committee information about the activities of that group" (R. 98). Sourwine was unable to explain why he was previously "surprised" at petitioner's actions if the Subcommittee had a letter from a "reliable" informant saying what Sourwine testified it said (R. 112). Sourwine was likewise unable to explain how or why the name "Willard Shelton" had been put on the Subcommittee subpoena, if the Subcommittee had a letter concerning "a Shelton" on the Times, since Willard Shelton had never had any connection with the Times; Sourwine only volunteered his surmise of the "process" by which the subpoena had been issued (R. 102-103):

> "Somebody in the typing section at some point, having the name Shelton and not having the first name, asked somebody else, 'What is this fellow Shelton's first name?' Somebody else said, 'What, what Shelton?' He said, 'The newspaperman Shelton.' And somebody who knew that there was a newspaperman named Willard Shelton said, 'Willard'. Now that is wholly a guess."

Despite the fact that petitioner had made clear that probable cause was to be the major factual issue at the trial, Sourwine disclosed on cross-examination that he actually had not seen the alleged anonymous letter for over a year before the trial (R. 184), nor had he bothered to examine it while preparing his testimony (R. 98). Cross-examination also revealed that the identity of the supposed "reliable" informant was unknown to Sourwine and even to the Subcommittee members (R. 100-101); Sourwine purported to have identified as a "reliable" informant the author of the letter concerning "a Shelton",

because of resemblance to other letters from the same informant in its "typing" and its "tone" (R. 102). Under persistent cross-examination Sourwine next affirmed that the purported letter contained the names of some 15 to 18 other persons "identified" by the anonymous informant (R. 172 et seq.); however, the *only* one of the 15 to 18 listed names Sourwine could recall was "Shelton" (R. 185-88, 189-90, 196). Finally, Sourwine asserted that there had been a whole series of letters from the anonymous informant, but when pressed further as to the content of the supposed "Shelton" letter, whose "typing" and "tone" he had earlier recalled, Sourwine now testified, *"I have no actual independent memory of this particular letter as a sheet of paper and what was on it"* (R. 186).[3]

At all stages of the trial the Government vehemently opposed repeated defense requests to produce the supposed anonymous letter about which Sourwine gave this remarkable testimony. Even prior to the trial, petitioner had subpoenaed Committee records to prove that there was absolutely *no* information concerning petitioner in the Subcommittee files and that it had called him arbitrarily and without probable cause. The Government vigorously opposed the subpoena and it was quashed by the Court at the outset of the trial (R. 25-39). After the testimony by Sourwine about the supposed letter, petitioner moved repeatedly for the production of that letter (R. 99, 117, 169, 181) to prove that Sourwine's improbable and contradictory testimony as to its content

[3] The Court will note, of course, that the only things Sourwine could "recall" about the alleged letter were those which would help rationalize the issuance of the subpoena to Willard Shelton. Thus, for example, he could remember that the informant gave the name of Shelton with no first name and that the Shelton was a newspaperman, i.e., on the news side of the Times. This precise recollection is all the more remarkable when contrasted with the failure to remember a single additional name out of the 15 or 18 others supposedly mentioned in the letter.

was false, that no such letter ever existed (R. 143, 194), and that the Government's "probable cause" contention was a fabrication. Sourwine, however, asserted that he would not produce the anonymous letter because it was "*confidential*" (R. 118, 212).

The Trial Judge was thus put in a difficult position, for he was aware (see R. 30-33) that in a criminal case he could not permit the Government to rely for its proof of "probable cause" on a confidential document withheld from the defense and thus insulated from refutation.[4] The Court first sought to avoid the necessity of ordering production of the "letter" by a preliminary ruling that probable cause to call petitioner to the 1956 hearing was provided not by any letter, but by petitioner's refusal in the earlier 1955 executive session to answer certain of the Subcommittee's questions (R. 181-83). Thereupon petitioner submitted a memorandum to the trial court (see R. 213) pointing out that the decisions of this Court prevent the fruits of an illegal search or seizure from being relied upon as prob-

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[4] See, e.g., *United States* v. *Coplon*, 185 F. 2d 629, cert. denied, 342 U.S. 920. It is also clear that on a challenge to the existence of probable cause, the so-called "informant's privilege" is inapplicable. *Roviaro* v. *United States*, 353 U.S. 53, 60-61; *Cochran* v. *United States*, 291 F. 2d 633. See also *Hill* v. *State*, 151 Miss. 518, 118 So. 539 (1928), and *Smith* v. *State*, 169 Tenn. 633, 90 S.W. 2d 523 (1936). As the California Supreme Court recently emphasized (*Priestly* v. *Superior Court*, 50 Cal. 2d 812, 818, 330 P. 2d 39, 43 (1958)):

> "Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue."

The dilemma created by the Government's attempt to rely upon what it refused to divulge, was conceded by prosecuting attorney Hitz (R. 212):

> ". . . there is a technical problem arising within the confines of this courtroom . . . It has to do with the right of the defendant, as he asserts it, to further examine the witness Sourwine upon a document that we say procedurally, and as a matter of comity with another branch of the Government, and for reasons of national security, we preferred not to produce in court."

able cause for a subsequent search or seizure (*Nardone* v. *United States*, 308 U.S. 338; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385)—that if there had been no probable cause to call and question petitioner at the 1955 hearing, his refusal there on constitutional grounds to answer certain questions could not constitute "probable cause" for calling and questioning him at the 1956 hearing.

The Trial Judge was apparently persuaded by this view, for in rendering his opinion, he avoided relying for probable cause either upon the "anonymous letter" withheld at trial, or upon petitioner's failure to answer certain questions at the 1955 executive session. Instead, essentially accepting the prosecutor's "man off the street" theory, the District Court ruled that probable cause for the exercise of a Congressional committee's subpoena power over a witness *is not an issue cognizable by the courts in his subsequent contempt prosecution for refusal to answer* (R. 222-223):

> "There is a complete want of precedent, we believe, for the proposition defendant urges, which in simplest terms would limit the powers of a duly authorized committee of the Congress in conducting an inquiry for a legitimate legislative purpose by permitting such committee, and hence Congress itself, to compel the attendance and testimony of only such witnesses as the courts might judicially determine were reasonably expected to be in possession of pertinent information.
>
> "The doctrine of separation of powers and a rightful regard for the authority of the legislative branch of the Government, we believe, refutes a judicial evaluation of those matters which clearly are within the discretion of the Congress, which alone is responsible for the exercise of the authority from which the disputed power arises."

The District Court thus answered petitioner's constitutional objection by flatly holding that probable cause is not required to call and question a citizen before a Congressional committee and to punish him for contempt if he refuses to answer. As an afterthought, the opinion then weakly suggested that probable cause to question petitioner might nevertheless be found in a consideration nowhere suggested by the Subcommittee, by witness Sourwine or the prosecution—the Subcommittee's information of "communist infiltration into . . . elements of the New York newspapers, including the one by which defendant was employed" (R. 223).

The Court of Appeals opinion leaves unclear whether it shared the view of the District Court that the Fourth Amendment is inapplicable to Congressional subpoena power. Rather than deciding this question, the court below found "probable cause" for petitioner's interrogation in the Subcommittee's information that *some* members of the "working press" were (or had once been) Communists (R. 243-244):

> "After the important revelations of Winston M. Burdett, it was surely not a 'dragnet' process to call appellant as a member of the working press to check on possible Communist Party activities among his fellow employees."

Thus, the court below held the Burdett testimony—that in the early '40s some Brooklyn Eagle and Newspaper Guild members had been Communists—sufficient to justify the Subcommittee's subpoenaeing at random, fifteen years later, *any* "working press" employee to question him about possible Communist associations.[5]

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[5] There are 5,700 New York Times employees; 30,000 "news reporting employees" in the country; and a far larger number of total employees on the 1,755 daily newspapers in the United States (see R. 129; 1959

2. *The "Question Under Inquiry" Issue*

From the moment that petitioner first came in contact with the Internal Security Subcommittee—when it served upon him a bifurcated subpoena for the appearance of "Willard Shelton or Robert Shelton"—there was bound to be confusion concerning the subject of inquiry upon which the Subcommittee sought his testimony. This doubt was repeatedly reflected at the executive Subcommittee hearing in 1955 where petitioner objected that "*the actual basis for the inquiry has not been stated to me, nor does it appear on the subpoena*" (R. 55). At that time petitioner was informed by Subcommittee counsel Sourwine that he had been called "to clear up a question of identity. The record will show that the witness was not charged with being a Communist (R. 56)." When called once more in the 1956 open hearing, petitioner again voiced his doubts as to what the inquiry was about, stating "I fail to see why I am involved in this hearing which the chairman said on Wednesday stems from the Burdett testimony. There was no reference to me in the Burdett testimony . . ." (R. 84). In the course of his 1956 interrogation the petitioner re-

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Annual Report of the New York Times; Editor and Publisher Yearbook, 1960; Occupational Outlook Handbook, 1959, Bureau of Labor Statistics Bulletin 1255). Apart from the dragnet subpoena power which the decisions below would grant to a Congressional committee to call any of thousands of press employees because it had information that some few were Communists, it should be noted that Mr. Sourwine repeatedly made clear that the Subcommittee did not call particular witnesses on any such generalized basis. The following answer by Mr. Sourwine is illustrative:

> "Q. I will repeat the question. Did the committee call the past and present New York Times employees before it in these executive and open sessions because it believed there was a high percentage of ex-communists on the Times?
>
> "A. No. The committee called these people before it *because it had information that the persons whom it called* were in a position to give the committee information about the matters it was investigating" (R. 155; see also 157). (Emphasis supplied)

peatedly reasserted his challenge to the jurisdiction of the Subcommittee, which had not yet explained the reason for his interrogation or the subject thereof—but all without avail.

The "question under inquiry" in the Subcommittee's January 1956 Times hearing was, from the first, doomed to remain in doubt, for the Subcommittee had never even met to authorize the investigation, much less to determine its scope. As Senator Hennings noted at the opening of the hearing (R. 72): "the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings." The hearing accordingly covered a number of diverse and unrelated subjects without ever focusing on a single subject under inquiry. It has subsequently been suggested in this case (1) that there was no more limited question under inquiry than the Subcommittee's authorizing resolution—i.e. Communism generally; (2) that the question under inquiry was Communist infiltration into news media; (3) that the question under inquiry was Communism in the New York Typographical Union or in the New York area; and (4) that the question under inquiry was Communism on the New York Times. In this case, one or more of these "questions under inquiry" were espoused by the Subcommittee Chairman, by Senator Hennings, by the prosecuting attorney, by Government witness Sourwine, and by the courts below:

i. *Subcommittee Views.* The 1956 Times hearing was denominated by the Subcommittee, when it printed the hearing, as "Strategy and Tactics of World Communism, Communist Activity in New York" (Gov. Exh. No. 7). Senator Eastland, however, spoke of the hearing at the opening on January 4, 1956, as one to "pursue every lead which developed out of the Burdett testimony" (R. 71); he said "we are not . . . investigating any newspaper or

any group of newspapers" (R. 73). Senator Hennings, on the other hand, said, "the committee is interested in the extent and nature of so-called Communist infiltration, if such exists, into any news-dispensing agency" (R. 72).

ii. *Prosecution's Theory.* A radically different theory was expressed in the Government bill of particulars concerning the "question under inquiry" (see R. 16, 19-20). Prior to trial, petitioner had moved to quash the indictment because it failed to advise him of the "question under inquiry," an essential element of the crime under 2 U.S.C. § 192 (R. 9). Judge Holtzoff denied that motion (R. 19), whereupon counsel asked instead for a bill of particulars on "the nature of the question under inquiry before said committee" upon which the Government was relying under the indictment (R. 16, 19). Judge Holtzoff granted that request, whereupon the prosecution stated in open court that the question under inquiry which the Government would prove under the indictment was the authorizing language of Senate Resolution 366, *and no more limited inquiry* (R. 20):

> "As to the second asking, the Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.
>
> "This committee was conducting the inquiry for the purpose contained in the resolution and no lesser purpose so that, in that sense, the asking No. 2 of counsel will be supplied by his reading the resolution."

iii. *Sourwine Evidence.* A still different view of the "question under inquiry" emerged from the trial testimony of Government witness Sourwine. He testified that there were four diverse questions—Communism generally,

Communism among newspaper people, Communism on the Times, and Communism in the Typographical Union—*simultaneously* under inquiry at the time of petitioner's appearance (R. 138-139):

"Q. . . . I refer you to 2 U.S.C. 192, the contempt statute, which says that it shall be contempt for refusing to answer any question pertinent to the question under inquiry. I ask you, what was the question under inquiry when the defendant testified?

"A. Well, there are two ways to answer that. Broadly, the question under inquiry was the scope and extent and activities of the communist conspiracy against the United States, more specifically, as it applied to the New York area, and on the particular day he testified, and with regard to his testimony, still more specifically within that broader area, and we endeavored to get information about communist activity in the New York Times or in connection with employees of the New York Times or by such employees.

"Q. So there are three gradations.

"A. You can make as many gradations as you want. I am attempting to answer your question.

"The committee, every time it sits, Mr. Rauh, sits with its full authority. That authority is fixed by the Senate of the United States, and neither the full committee nor the subcommittee can change it. I am trying to be responsive to your question.

"When the committee was questioning this particular witness, within the area of its much broader investigation, it was concerned with the particular areas of that broader investigation which concerned communist activity among newspaper people, communist activity on the New York Times, and communist activ-

ity in an effort to infiltrate the Typographical Union in New York."

iv. *The Courts' Views.* Contrary both to the prosecution's bill of particulars (that the question under inquiry was S. Res. 366, i.e., Communism generally) and to the Subcommittee's witness Sourwine (that the question under inquiry was 4 different things), the District Court ruled in its opinion that "the Court finds that the hearing in question dealt with the existence and extent of subversive infiltration in the news media" (R. 225) and that "the subcommittee was then engaged in attempting to ascertain the extent and nature of Communist infiltration into news dispensing agencies" (R. 224). The Court of Appeals characterized the hearing as one to investigate "infiltration of Communists into the radio, TV, and the press" (R. 243). Neither of the opinions below makes mention of the bill of particulars, although the binding nature of the bill on the "question under inquiry" was explicitly urged before both courts below (R. 199-200; Appellant's Br. in Ct. App., pp. 17-21).

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On January 18, 1957, the District Court convicted petitioner on the first two counts of the indictment and acquitted him on the third count (R. 214). Prior to sentencing, petitioner's counsel requested suspension of any sentence of imprisonment, particularly in the light of the accepted consideration of petitioner's unblemished record. The Court told petitioner that "so far as your personal demeanor before the committee of the Congress, you didn't display the contemptuous attitude that many in the same category do." But the Court then sentenced him on each count to a fine and six months' concurrent imprisonment, without suspension, stating that "The press and the radio reports this morning matters that are very disturbing from

the standpoint of communism and its threats to our republican form of Government, and in this case I do not feel that I can put you on probation" (R. 228-231). The Court of Appeals affirmed the judgment of the District Court on June 18, 1960 (R. 232).

Summary Of Argument

I

The Senate Internal Security Subcommittee arbitrarily compelled petitioner to appear and testify before it in the course of its New York Times investigation without probable cause or reason to believe him possessed of pertinent information on its inquiry. In so doing, the Subcommittee violated petitioner's Fourth, Fifth and First Amendment rights.

Petitioner respectfully submits (a) that, contrary to the Government's position that a Congressional committee may call "a man off the street" and interrogate him by compulsory process concerning possible Communist associations, a Congressional committee may *not* constitutionally subpoena a witness without probable cause to believe that he has information relevant to the committee's inquiry; (b) that there was no such probable cause to summon petitioner; and (c) that the Subcommittee through its compulsory interrogation of petitioner under the circumstances presented by this record, was making an unjustified intrusion upon liberties of speech, press and association under the First Amendment.

A. This Court's prior rulings and the constitutional history reflected therein, preclude Congressional inquiry without "probable cause", just as they forbid all other forms of arbitrary Governmental intrusion upon the privacy of the citizen. Nothing in the history from which the Fourth

Amendment was born, nothing in the Amendment's language, nothing in this Court's adjudications or in the compelling exigencies of our time warrants the Government's startling conclusion that a Congressional committee may call "a man off the street" on pain of contempt if he refuses to answer. Under our Bill of Rights, no more may a Congressional committee search a man's mind without probable cause than a constable may search his papers or his pockets.

Ever since *Boyd* v. *United States*, 116 U.S. 616, compulsory Governmental process has been held to be subject to Fourth and Fifth Amendment limitations, whether issued by a court, a grand jury, a regulatory agency, or the Executive. This same principle was applied to Congressional committees in this Court's recent decisions, culminating in the Court's emphasis in *Wilkinson* v. *United States*, 365 U.S. 399, 412, upon the fact "that the petitioner was not summoned to appear as a result of indiscriminate dragnet procedure, lacking probable cause for belief that he possessed information which might be helpful to the subcommittee . . ."

Behind the adoption of the Fourth Amendment lay centuries of conflict in which Court, Crown and legislature had singly and in combination challenged the basic "right of privacy" of the citizen. To Englishmen confronted by the Court of Star Chamber or to colonists faced with writs of assistance, the protections later incorporated into our Bill of Rights were of broad and fundamental significance. Their unrelenting struggle against governmental intrusion on privacy of "persons, houses, papers and effects", provides what this Court recently called the "intellectual matrix" underlying the Fourth Amendment (*Marcus* v. *Search Warrants*, 367 U.S. 717, 729). The history of two centuries of oppression on both sides of the Atlantic was well known to the men who wrote our Constitution, for

they had not only resisted it in the Colonies, but their forefathers had fled from it in the mother country. The Federal Constitution was given its firm foundation by a specific Bill of Rights, whose interrelated guarantees of personal privacy, due process and political freedom, were intended forever to preclude unjustified intrusion on the homes, the possessions, the beliefs and expressions of its citizens.

B. The Subcommittee had no probable cause or reason to believe that petitioner had information pertinent to its inquiry. The trial court weakly and belatedly suggested and the court below later adopted the contention that probable cause was supplied by the testimony of one Winston M. Burdett concerning Communists in the media of communications some 15 years earlier. All apart from the fact that neither the Subcommittee nor the prosecution at the trial ever suggested any such loose rationale of probable cause (see n. 47, p. 50, *infra*), the court below fails to explain why it was not "a dragnet process" randomly to exercise the power of compulsory process among 30,000 members of the working press or 5,700 employees of the New York Times (see n. 5, p. 16, *supra*), on the mere chance or possibility that those subpoenaed might have information concerning Communist activities in the press or on the Times. Neither court below sought to square so sweeping and haphazard a use of compulsory process—a modern version of the odious "general warrant"—with the constitutional prohibition upon unreasonable search or the requirements of probable cause and due process.

If haphazard inquisition for Communists among presumably innocent members of the press or employees of the Times is not dragnet inquiry, then it is difficult to conceive of any inquiry which is. For there is no industry or profession in America today as to which someone has not

charged some degree of Communist infiltration, and thus, on the theory of the court below, any person in any industry or profession could be called without further ado (see n. 48, p. 52, *infra*). Neither the Fourth Amendment nor Fifth Amendment due process permit the haphazard use of Congressional subpoena power on the off chance that the witness, called at random from among thousands of newspapermen, may have information about Communist activity in the press.

C. The Subcommittee's action also violated the First Amendment. While the hearing record is replete with protestations that the Subcommittee was not investigating the press or the Times, but merely Communist influence therein, the full record demonstrates the contrary. In its interrogation of Times witnesses, the Subcommittee certainly did not restrict itself to questions about Communist Party membership and activity, but ranged widely into personal and private affairs. Thirty of the 38 witnesses called at the 1955 executive hearing were or had been connected with the Times and 15 out of 18 witnesses called at the 1956 public hearing were so connected (R. 145-149). The inevitable effect of wholesale interrogation and exposure of any alleged Communists or others the Subcommittee could find on the New York Times, is necessarily to discourage newspapers from hiring persons of unpopular, unorthodox, or minority views, past or present, who may become the subjects of similar Congressional scrutiny. The resulting elimination of persons from the press who hold or held minority views, is as effective a form of censorship and restraint as the deletion of the material they could contribute to the press.

Whatever might be said of the impact of the First Amendment when the Subcommittee questioned other witnesses in its New York Times hearing (as to whom it might have had reason to believe them possessed of pertinent informa-

tion), clearly the First Amendment imposes an insuperable bar to affirmance of this petitioner's conviction. In *Watkins* v. *United States*, 354 U.S. 178, 197, this Court referred to the necessary "accommodation of the Congressional need for particular information with the individual and personal interest in privacy" and concluded (at 198) that "the critical element is the existence of and weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness." Lacking any probable cause or reason to believe Shelton to have pertinent information on the Subcommittee's inquiry, there is no "Congressional need" presented here for "accommodation . . . with the individual and personal interest in privacy." There can be no Congressional need for the testimony of a victim of accident.

Whether the Subcommittee's interrogation of petitioner be deemed violative of Fourth, Fifth or First Amendment rights taken separately or together (or of the contempt statute's requirement of pertinency, see n. 53, p. 57, *infra*), it is clear that federal courts cannot, through contempt convictions, vindicate Congressional process under which newspapermen are arbitrarily called and questioned about Communism, without reason to believe that they have pertinent information on that subject.

II

There was no delimited "question under inquiry" before the Subcommittee at the time of petitioner's appearance.

1. The difficulties in this case concerning the nature of the "question under inquiry" in petitioner's interrogation began with the inquiry, were exacerbated at the trial, and remain unanswered even after judgment in the Court of Appeals. As we have demonstrated (see pp. 17 to 21, *supra*), successively different definitions of the question

under inquiry were given by Senator Eastland and by Senator Hennings at the hearing; by the Assistant United States Attorney in response to a requested bill of particulars; by Government witness Sourwine at the trial; and by the lower court opinions. Certainly, where the views of the Subcommittee members and of the prosecution, the trial evidence, and the findings of the lower courts on the "question under inquiry" are as diverse and inconsistent as in the instant case, it cannot be said that the point was made sufficiently luminous to the witness at the time of the Subcommittee interrogation to meet constitutional due process requirements. *Watkins* v. *United States,* 354 U.S. 178, 208-9. Whether it was because the Subcommittee did not yet have the guidance of the *Watkins* decision, or whether it was because the Subcommittee's primary interest was in the coercion of the New York Times, we respectfully submit that no one, from witnesses to Subcommittee counsel, from prosecutor to Subcommittee members, had the vaguest idea of any actual delimited question under inquiry in the January 1956 hearing of the Subcommittee.

2. Whether a sufficiently delimited inquiry was made manifest when petitioner was questioned need not be decided, for here the Government's bill of particulars on the "question under inquiry" to be proved under 2 U.S.C. § 192 calls directly into play this Court's *Watkins* holding that a general authorizing resolution is not itself sufficiently precise to serve as a "question under inquiry". In the District Court the prosecution, by its bill of particulars, elected to rely on precisely such a broad authorizing resolution (Senate Resolution 366) and no lesser inquiry as the "question under inquiry" to be proved under the indictment. While both courts below sought to find a more limited inquiry—Communist influence on the Times or in communi-

cations—the bill of particulars is, of course, binding for the proposition that no such limited question under inquiry was being pursued by the Subcommittee in its interrogation of petitioner. The only remaining question is whether Section 3 of Senate Resolution 366 (see p. 3, *supra*) has the specificity which this Court ruled in *Watkins* was lacking in the House Un-American Activities Committee authorizing resolution. Even cursory comparison of the two texts is sufficient to demonstrate that the almost identical substance of the Senate Resolution is no more precise as a "question under inquiry" than is that of the House. Thus the exact holding of *Watkins* that a general authorizing resolution does not constitute a sufficiently delimited "question under inquiry" is controlling in the instant case.

III

Petitioner's conviction must be reversed because the indictment failed to state the "question under inquiry." For the sake of brevity and convenience of the Court, petitioner Shelton relies on Argument II of the brief for petitioner in *Russell* v. *United States* (No. 8) and requests reversal on the authorities there presented.

IV

Petitioner was deprived of his right to a fair and impartial grand jury because 14 of the 23 members of the grand jury which voted the indictment against petitioner were, at that time, employed by the United States Government (R. 4). For the sake of brevity and convenience of the Court, petitioner Shelton relies on Argument I of the brief for petitioner in *Russell* v. *United States* (No. 8) and requests dismissal of the indictment.

ARGUMENT

I

In Violation of Fourth, Fifth and First Amendment Guarantees, the Subcommittee Arbitrarily Compelled Petitioner to Appear and Testify Before It in Its New York Times Investigation Without Probable Cause or Grounds to Believe Him Possessed of Pertinent Information on Its Inquiry.

From the very outset of petitioner's trial for contempt, the Government was aware of the major constitutional objection being interposed by petitioner in his defense, his counsel having challenged from the first the existence of any probable cause or reason for belief on the part of the Subcommittee that Robert Shelton had relevant information to give it. To that challenge the prosecution promptly replied by asserting the right of the Congressional Committee to call "*a man off the street*" and interrogate him by compulsory process concerning possible Communist associations.[6] It was essentially this theory which the District Court's opinion of conviction adopted; the District Court held itself powerless to permit a Congressional Committee "to compel the attendance and testimony of only such witnesses as the courts might judicially determine were reasonably expected to be in possession of pertinent

[6] In a second suggested line of defense the prosecutor proposed to prove that the Subcommittee actually had probable cause to call and question the petitioner. This second line of defense came to an end at the trial when the Government refused to produce the "anonymous letter" upon which it had sought to rely as the Subcommittee's "probable cause" for having interrogated petitioner, and thus the trial court as well as the court below carefully avoided reliance upon the supposed letter. In this Court and the courts below the Government has not suggested any theory upon which the supposed letter withheld at the trial can be relied upon in any way to sustain petitioner's conviction and thus there is no need to consider whether an anonymous letter could ever constitute probable cause. Cf. *Cochran* v. *United States*, 291 F. 2d 633.

information." In short, the District Court refused to entertain the Fourth Amendment objection as an issue cognizable in a contempt of Congress prosecution under 2 U.S.C. § 192. The first and signal question thus presented is whether it is an appropriate defense to a prosecution for contempt, that the Committee subpoenaed the witness arbitrarily and without probable cause or any reason to believe him possessed of pertinent information on the subject of its inquiry.[7]

If, however, as we will seek to show, the Fourth Amendment *does* apply to compulsory Congressional process, there then arises as a second issue for this Court's adjudication the existence or nonexistence of probable cause for petitioner's interrogation by the Subcommittee. This issue arises by virtue of the District Court's afterthought

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[7] Not only in the District Court but in this Court the Government appears to prefer the "man off the street" rationale which denies the applicability of the Fourth Amendment rather than attempting to rationalize the record in this case with the Amendment's commands. Thus, in the Government's Brief in Opposition here, it argued the inapplicability of the Fourth Amendment to petitioner's compelled interrogation before the Subcommittee, stating (pp. 10-11):

> ". . . while the Fifth and First Amendments protect witnesses who appear before Congressional committees, neither the language of the Fourth Amendment nor the decisions of this Court suggest that the scope of the Amendment extends to subpoenas to testify. On the contrary, the Amendment makes clear that it was intended to protect 'persons, houses, papers, and effects' from improper search or seizure, and not, like the Fifth Amendment, to protect witnesses from being forced to testify. This Court has never held that the Fourth Amendment is relevant to subpoenas requiring witnesses to appear and testify. In *Boyd* v. *United States*, 116 U.S. 616, and the other cases cited by petitioner (Pet. 23-24), the Court decided that the Fourth Amendment applies to subpoenas *duces tecum* because the 'compulsory production of a man's private papers' 'accomplishes the substantial objects of [the] acts' of 'forcible entry into a man's house and searching amongst his papers'. 116 U.S. at 622. In contrast, the requirement that a person appear briefly before a Congressional committee does not accomplish the substantial object—or interfere with his right to the same extent—as seizure of his person by arrest."

suggestion, later adopted as the sole rationale of the Court of Appeals' disposition of the "probable cause" point, that probable cause existed for petitioner's compulsory interrogation on the chance that, as an employee of the Times or as a member of the working press, he would have information concerning Communist activity among his fellow employees (R. 223, 244).[8]

Finally, the Subcommittee, through its compulsory interrogation of petitioner under the circumstances presented by this record, was making an unjustified intrusion upon liberties of speech, press and association under the First Amendment. While this constitutional objection was rejected by the lower courts, neither court below sought to square the arbitrary or haphazard use of the subpoena as applied to an employee of the New York Times with this Court's *Watkins* ruling that only manifest legislative need will justify Congressional investigatory intrusion upon First Amendment rights. The Subcommittee's intrusion here on those rights underlines the importance of adherence to procedural guarantees which stand as a foremost protection against governmental repression of political freedoms.

We turn now to each of these three points to demonstrate (a) that a Congressional committee may not constitutionally subpoena a witness without probable cause to believe

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[8] The opinion of the Court of Appeals below is not entirely clear in this regard. The Court said, "After the important revelations of Winston M. Burdett, it was surely not a 'dragnet' process to call appellant as a member of the working press to check on possible Communist Party activities among his fellow employees" (R. 244). The court below appears to be saying that after Burdett's testimony the Subcommittee could call any member of the working press, rather than just any member of the New York Times. The use of the words "fellow employees", however, makes this unclear. But as we show in the text (pp. 50 to 53, *infra*), there was no probable cause to call petitioner either as an employee of the Times *or* as a member of the working press.

that he has information relevant to the committee's inquiry (pp. 32 to 50, *infra*); (b) that there was no such probable cause to summon petitioner (pp. 50 to 53, *infra*); and (c) that the Subcommittee was also making unjustified intrusion upon liberties of speech, press and association in the circumstances of this case (pp. 53 to 56, *infra*).

A. *This Court's prior rulings and the constitutional history reflected therein, preclude Congressional inquiry without "probable cause", just as they forbid all other forms of arbitrary Governmental intrusion upon the privacy of the citizen.*

From the time that the prosecution announced its position that the Internal Security Subcommittee could call a man off the street (R. 40) to the time that the Solicitor General opposed certiorari on the ground that the Fourth Amendment does not apply to "the requirement that a person appear briefly before a Congressional committee" (see n. 7, p. 30, *supra*), the Government has adamantly maintained that no probable cause is required for the Congressional utilization of compulsory process.[9] But nothing

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[9] The Government also suggested in its Opposition to the grant of certiorari that petitioner failed to raise his Fourth Amendment objection before the Subcommittee at the time of his appearance, and accordingly was not entitled to urge it in the courts (p. 9). It is perhaps enough, in answer to this "waiver" contention, to point out that it was never urged by the Government at petitioner's trial nor even in the Court of Appeals below. But even assuming that the Government can urge for the first time in this Court that petitioner's Fourth Amendment objection came too late in the District Court, there are three separate and conclusive answers to the Government's "waiver" suggestion:

First, petitioner *did* assert his Fourth Amendment objection before the Subcommittee when he objected that he had been called as a victim of accident, had no pertinent information to give the Subcommittee and did not understand "why I am involved in this hearing" (R. 84, 87, 89). As this Court pointed out in its ruling in *Quinn* v. *United States*, 349 U.S. 155, 162-63, no "special combination of words" is required to assert con-

in the history from which the Fourth Amendment was born, nothing in the Amendment's language, nothing in this Court's adjudications or in the compelling exigencies of our time warrants the Government's startling conclusion. *Under our Bill of Rights no more may a Congressional committee search a man's mind without probable cause than a constable may search his papers or his pockets.* The suggestion that a brief appearance before a Congressional committee constitutes neither a search nor a seizure of the person within the meaning of the Fourth Amendment is wholly novel and utterly lacking in support. The proposition is repelled by this Court's prior rulings, and the constitutional history upon which they are predicated and which gives them vitality. We review here-

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stitutional objections at a Congressional hearing, so long as the substance of the objection is made manifest. And, if it sufficed to raise a Fifth Amendment due process objection for petitioner Watkins to state that the question propounded to him was not "relevant", then certainly it sufficed here to raise Fourth Amendment and Fifth Amendment due process objections for petitioner Shelton to urge that he had been called for no apparent reason, as a result of an accident, and that he had no pertinent information to give to the Subcommittee.

Second, it should be noted that this Court has previously deemed the Fourth Amendment to be adequately preserved for invocation before the courts in the absence of an express waiver thereof. See *Amos* v. *United States*, 255 U.S. 313; *Johnson* v. *United States*, 333 U.S. 10. That same solicitude for constitutional rights precludes a finding of a waiver of constitutional rights here, where no waiver was intended or expressed. If Fourth Amendment rights are preserved though the citizen silently acquiesces in the search and seizure of his premises, they are all the more preserved by a witness who specifically *objects* to the Governmental process to which he is subjected—as did this petitioner.

Thirdly, as we suggest *infra* at n. 53, p. 57, if petitioner was called without probable cause to believe that he had pertinent information to give, then no offense has been made out under the statute, which punishes only refusal to answer questions pertinent to a pending inquiry. Certainly, if reason for belief that the witness has pertinent information is a necessary ingredient of the offense under 2 U.S.C. § 192, then the Government's proof of the issue fails if petitioner's contention is upheld. No pre-prosecution "waiver" by a defendant could supply a necessary element of the offense charged.

in these adjudications and that constitutional history, which demonstrate the necessity for applying to Congressional committee process in full and unattenuated form, constitutional guarantees against arbitrary governmental inquisition into the citizen's conduct, beliefs and associations.

1. *This Court's Adjudications.* Ever since *Boyd* v. *United States*, 116 U.S. 616, compulsory Governmental process has been held to be subject to Fourth and Fifth Amendment limitations, whether issued by a court (as in *Boyd*), a grand jury (*Hale* v. *Henkle*, 201 U.S. 43), a regulatory agency (*Interstate Commerce Comm.* v. *Brimson*, 154 U.S. 447), or the Executive (*Okla. Press Pub. Co.* v. *Walling*, 327 U.S. 186). Moreover, this Court has repeatedly made clear in its adjudication of Congressional contempt cases, that just like other Governmental departments, Congress may not make unreasonable or arbitrary use of compulsory process.

As early as *Sinclair* v. *United States*, 279 U.S. 263, 292, in a thorough analysis of the Congressional investigatory power, this Court reviewed its interdictions of "fishing-expedition" abuse, and declared:

> "It has always been recognized in this country, and it is well to remember that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures . . ."

More recently, in *Watkins* v. *United States*, 354 U.S. 178, 188, this Court emphasized that

> "The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves.

> They cannot be subjected to unreasonable search and seizure."

Again, in upholding the conviction in *Barenblatt* v. *United States*, 360 U.S. 109, 134, this Court noted that Barenblatt's interrogation did not involve "*indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee.*" Finally, only this year this Court unequivocally announced in its decision in *Wilkinson* v. *United States*, 365 U.S. 399, 412, that:

> "It is to be emphasized that the petitioner was not summoned to appear as a result of indiscriminate dragnet procedure, lacking probable cause for belief that he possessed information which might be helpful to the subcommittee. . . . the subcommittee had reason to believe at the time it summoned the petitioner that he was an active Communist leader. . . ."

The Court's opinion reemphasized the same point when it stated "the subcommittee had reasonable ground to suppose that the petitioner . . , possessed information that would substantially aid it in its legislative investigation."

This Court's continuing insistence upon the applicability to Congress of constitutional guarantees against arbitrary or dragnet inquisition, reflects the Court's awareness of the central significance attaching in our democratic form of government to individual privacy, free from all forms of unjustified Governmental intrusion by force or by compulsion of law. Perhaps the classic summary of this "first principle" is that by Mr. Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 478:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They

recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.* And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth." (Emphasis supplied)

In *Olmstead*, Mr. Justice Brandeis echoed this Court's earlier formulation in *Interstate Commerce Comm.* v. *Brimson*, 154 U.S. 447, 478-479, summarizing constitutional limitations which *"for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress"*:

"In accomplishing the objects of a power granted to it, Congress may employ any one or all the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the Constitution.

"We do not overlook those constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry

into the private affairs of the citizen. *Kilbourn* v. *Thompson*, 103 U.S. 168. We said in *Boyd* v. *United States*, 116 U.S. 616, 630—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man's home, and the privacies of his life. As said by Mr. Justice Field in In re Pacific Railway Commission, 32 Fed. Rep. 241, 250, 'of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.' "

Finally, as this Court has many times emphasized, the guiding formulation in adjudications under the Fourth and Fifth Amendments, which "run almost into each other", is provided by its landmark decision in *Boyd* v. *United States*, 116 U.S. 616, 630. There, in finding invalid Congressional legislation intruding upon Fourth Amendment protections, this Court warned that

> "The principles laid down in this opinion [*Entick* v. *Carrington*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his inde-

> feasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment."

The foregoing authorities provide a complete answer to the "man off the street" theory which would render it a contempt of Congress for a witness to refuse to answer, even though subpoenaed utterly unreasonably and wholly without probable cause. Yet we deem this case and the issue presented to be of sufficient importance to justify review of further constitutional authority. To this end we present below the relevant constitutional history which underlines the Fourth Amendment's unattenuated application to the search of men's minds by compulsory Congressional process.

2. *The Relevant Constitutional History.* Behind the adoption of the Fourth Amendment lay centuries of conflict in which Court, Crown and legislature had singly and in combination challenged the basic "right of privacy" of the citizen. To Englishmen confronted by the Court of Star Chamber or to colonists faced with writs of assistance, the privacy and security later guaranteed by our Bill of Rights were of broad and fundamental significance. Their unrelenting struggle against governmental intrusion on privacy of "*persons, houses, papers, and effects*", provides what this Court recently called the "intellectual matrix"

underlying the Fourth Amendment (*Marcus* v. *Search Warrants*, 367 U.S. 717).

The "right of privacy" received early recognition in the maxim "every man's house is his castle." [10] Sir Edward Coke cites it at the beginning of the 17th Century but it has earlier antecedents.[11] While the maxim emphasizes the sanctity of the dwelling, early evidence suggests concern with intrusion on the liberty and security of the person. Thus, *The Mirrour of Justices*[12] reports that the Ninth Century Anglo-Saxon king, Alfred the Great, "hanged Ostline because he judged Seaman to death by a false warrant, grounded upon false suggestion, which supposed Seaman to be a person in the warrant, which he was not." [13]

Yet documents from the Anglo-Norman period suggest that Englishmen gained early familiarity with inquisitorial methods. A study of that period indicates the issuance of general commissions of inquiry, such as for the arrest of all suspected of having committed a certain type of offense.[14] However, the early resistance of the English

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[10] Or, as Pitt was to phrase it in the Eighteenth Century, "the poorest man, may, in his cottage, bid definance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement." Quoted in Cooley, *A Treatise on Constitutional Limitations* (8th ed. 1927), I, 611, n. 1.

[11] Actually the maxim pre-dates recorded English history. Professor Max Radin contends that it comes directly from Roman law: "nemo de domo sua extrahi debet." Radin, *Handbook of Roman Law* (1927), p. 475, n. 28.

[12] Usually this work is attributed to Andrew Horne. While it was probably written in the latter half of the Thirteenth Century, the material used predates the Norman Conquest.

[13] Horne, Andrew, *The Mirrour of Justices*, (1903 ed., Washington), ch. V, sec. 1, p. 246. Alfred also "hanged Muclin because he hanged Helgrave by warrant of indictment not special." Id. at 248.

[14] *Select Cases Before the King's Council*, 1243-1482 (I. S. Leadam and J. F. Baldwin, edd.), "Selden Society Publications" (Cambridge, 1918), XXXV, p. xl.

people to such methods also is indicated by the enactment, in 1360, of a statute pertaining to the powers of the justices of the peace. "The King will," the statute provided, "*that all general inquiries before this time granted within any seignories, for the mischiefs and oppressions which have been done to the people by such inquiries, shall cease utterly and be repealed.*" [15]

The Fourteenth century also witnessed the first enactment of statutes granting general powers of search and seizure. In 1335, innkeepers in passage ports were instructed to search guests for false money imported and were rewarded with a percentage of any resulting forfeiture. Official searchers in turn were to search the inns to check on the innkeepers.[16] Significantly, by 1402 it was necessary to enact further legislation to regulate abuses among these official searchers. See 4 Hen. IV, ch. 21. In the reign of Henry VI, the Company of Dyers in London was granted the privilege of searching for and seizing cloth dyed with logwood.[17] And a few years later, a statute gave the governing authorities of every city, borough, or town, and the masters and wardens of all tallow-chandlers, "full power and authority to search all manner of oils brought into the said city of London to be sold, in whose hands they be or shall be found, and that as often as the case shall require." [18] These early dragnet warrants are of importance as precedents for later action. The writs of assistance of colonial America stem directly from them, as do proceedings of the Star Chamber and later Parliamentary enactments designed to ferret out the great offenses of the

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[15] 34 Edw. III, ch. 1 (1360).

[16] 9 Edw. III, St. II, ch. 11 (1335).

[17] See Thomson, *Historical Essay on the Magna Charta of King John* (1829), p. 226.

[18] 3 Hen. VIII, ch. 14 (1511).

Fifteenth, Sixteenth and Seventeenth Centuries—heresy and subversion.

In due course, in the Elizabethan, Stuart, and Cromwellian periods, the history of search and seizure "runs into a broader channel." [19] It is during these periods that abuse of the right of privacy became a weapon for the suppression of nonconformist utterance and belief. In 1566, the Privy Council issued an ordinance in aid of the licensing of books and the restricting of printing,[20] noteworthy for granting to the wardens of the Stationers' Company authority to open all packs and trunks of papers and books brought into the country, to search in any warehouse, shop, or any other place where they suspected a violation of the laws of printing to be taking place.[21] Subsequently, the Star Chamber Decree of 1586 recited that the various laws and ordinances to regulate printing had been totally unheeded and ineffective and provided for stricter censorship, more rigorous penalties, and similar unlimited powers of search and seizure.[22] Increasingly, the jurisdiction of the Court of Star Chamber and of its ecclesiastical counterpart, the Court of High Commission, were expanded in the detection and punishment of nonconformism, seditious libel, and parallel offenses.[23] To

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[19] Lasson, *History and Development of the Fourth Amendment to the U. S. Constitution* (1937), p. 24.

[20] Reprinted in Tanner, *Tudor Constitutional Documents* (1st ed., 1922), 245-47.

[21] See Arber, *Transcript of the Registers of the Company of Stationers of London* (London, 1894), (Reprint ed., New York 1950), I, p. 322.

[22] Ibid., II, pp. 807-812.

[23] The Star Chamber, initially established to redress the rigidity of the common law in order to secure justice, became the symbol of governmental oppression. It was exactly because it was outside the common law tradition that it could later dispense with those rudimentary procedural protections afforded by the common law courts and resort to summary proceedings and torture. Because of the ease of obtaining convictions, the Star Chamber ultimately assumed jurisdiction even in ordinary libel cases. According to Lord Camden, it was because of this

this end, no limitations were observed in granting messengers powers of search and arrest. "Persons and places were not necessarily specified, seizure of papers and effects was indiscriminate, everything was left to the discretion of the warrant. Oath and probable cause, of course, had no place in such warrants, which were so general that they could be issued upon the merest rumor with no evidence to support them and indeed for the very purpose of possibly securing some evidence in order to support a charge."[24]

In 1634, the Court of High Commission issued circulars to all peace officers directing them to search every room of any house where they should have intelligence that nonconformist services were being held, to arrest all persons there assembled, and to seize all unlicensed books.[25] Such general warrants of the broadest kind were not uncommon throughout these years. Finally, as an act of desperation, in 1637 the Star Chamber issued another ordinance placing still stricter censorship upon everything printed. Searchers were given authority in even more blanket terms than before and express provision was made that they could search at any time of the day or night they saw fit.[26]

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practice that there were no libel cases in the Court of King's Bench before the Restoration. See *Entick* v. *Carrington*, XIX State Trials (Howell) 1029, 1069 (1765).

[24] Lasson, *History and Development of the Fourth Amendment to the U. S. Constitution* (1937), 26. Thus, a Privy Council warrant was issued in 1596 for the apprehension of a certain printer, upon information "which maye touche" his allegiance, with authority to search for and seize "all bookes, papers, writinges and other thinges whatsoever that you shall find in his house to be kept unlawfully and offensively, that the same maie serve to discover the offense wherewith he is charged." *Acts of the Privy Council*, Dasent (ed.), (1902), XXVI, 425. In 1593, the Court of Star Chamber isued a warrant to three messengers authorizing them to search for and arrest every person suspected of producing certain objectionable and allegedly libelous posters "and for that purpose to enter into all houses and places where anie such maie be remaining." Ibid., XXIV, 222.

[25] Stephen, *History of Criminal Law in England* (1883), II, 426-7.

[26] Arber, *Transcript of the Registers of the Company of Stationers of London* (1894), IV, pp. 529-36

In the same year, John Lilburne, the great Leveller, first encountered serious difficulty with the Crown. Lilburne was charged with importing books critical of the episcopate. At his trial, he freely answered questions relating to the crime with which he had been charged but, when the interrogation turned to the conduct of other men and his relation with them, he refused to answer, stating that these questions were "nothing pertinent to my imprisonment, for I am not imprisoned for knowing and talking with such and such men, but for sending over books. . . ."[27] Lilburne's refusal to answer questions was not based on any absolute privilege against self-incrimination, as was his defense in subsequent trials, but against random inquiry which went beyond the accusation against him. His defense did not save him from being judged in contempt and punished, but it aroused the widespread resentment which hastened the overthrow of the Courts of Star Chamber and High Commission in 1641. Unfortunately, the demise of these bodies did not signal greater concern for the citizen's rights. The persecuted became persecutors; orthodoxy was now suspect rather than nonconformism.

Yet while the abuse of privacy was commonplace during and after the Puritan Revolution, there were exceptions to the rule. In 1621, a member of Parliament was recommending that general warrants should not be issued so frequently.[28] Following the Revolution, the Earl of Stafford was impeached, in part because he had granted to a certain bishop and his subordinates a general warrant of arrest.[29] Many pamphlets appeared denouncing a Cromwellian excise tax and the procedures of its enforcement.[30] Such

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[27] III State Trials (Howell) 1315, 1318 (1637).

[28] See Lasson, *History and Development of the Fourth Amendment to the U.S. Constitution* (1937), 29.

[29] III State Trials (Howell) 1381, 1391 (1640).

[30] See citations in Kennedy, *English Taxation* (1913), p. 62 notes 1 and 4.

procedures provoked remonstrances from "a public opinion which was becoming more and more sensitive to arbitrary practice and more alive to what ought to be the right of the individual."[31] Moreover, even while the Crown and Commonwealth were utilizing general warrants and arbitrary search and seizure, the common law was fashioning safeguards.

Sir Matthew Hale's work, *History of the Pleas of the Crown*, published in 1680, is indicative of this trend. According to Hale, great emphasis must be placed on oath, probable cause and particularity of the person to be apprehended. The warrant, when issued, must "express the name of the party to be taken; for a warrant granted with a blank and sealed, and after filled up with the name of the party to be taken is void in law."[32] Furthermore, "where upon a complaint to a justice of a robbery he made a warrant to apprehend all persons suspected, and bring them before him, this was ruled a void warrant. . . ."[33] And in a later passage Hale concludes " . . . a general warrant upon a complaint of robbery to apprehend all persons suspected, and to bring them before, etc., was ruled void, and false imprisonment lies against him that takes a man upon such a warrant."[34]

At the same time, the executive and legislative branches continued to disregard common law procedures and to sanction abuses and it was becoming increasingly apparent that these conflicting attitudes toward individual privacy could not continue side by side. The issue was finally to be resolved in a series of opinions by Lord Camden,

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[31] Lasson, *History and Development of the Fourth Amendment to the U. S. Constitution* (1937), p. 34.

[32] Hale, *History of the Pleas of the Crown* (London, 1778 ed.), I, 577.

[33] Ibid., II, 112.

[34] Ibid., I, 580.

but even before these were handed down there were signs of reform. Late in the reign of Charles II, Chief Justice Scroggs issued general warrants. Subsequently, in 1680, he was impeached by the House of Commons, in part because of his issuance of "general warrants for attaching the persons and seizing the goods of his majesty's subjects, not named or described particularly in the said warrants."[35] After the Glorious Revolution, one of the first acts of the new government was to abolish "heath-money", in the collection of which officials had been exercising the right of entry into all houses any time during the day.[36] Yet intrusions did not end, and secretaries of state continued to issue general warrants in seditious libel and similar cases. It was the issuance of such a warrant that set the stage for Lord Camden's historic pronouncements on the right of privacy.

In 1762, John Wilkes, a member of Parliament, began his anonymous publication of a series of pamphlets entitled the *North Briton*. The tenor of the publications was one of scorn for the incumbent government. The pamphlets continued until the following year, when *Number 45* of the series appeared, containing an unusually bitter attack. At this point a warrant was issued to four messengers by Lord Halifax, the secretary of state, ordering them "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, the *North Briton, No. 45.*"[37] The warrant was general in all respects: As to persons to be arrested, places to be searched and papers to be seized. "Of course, probable cause upon oath could necessarily

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[35] VIII *State Trials* (Howell) 163, 200 (1680).

[36] I *Wm. and M.*, ch. 10 (1688).

[37] Reprinted in *The King* v. *Wilkes*, 2 Wils. K. B. 151, 95 Eng. Rep. 737 (1763).

have no place in it since the very questions as to whom the messengers should arrest, where they should search, and what they should seize, were given over into their absolute discretion. Under this 'roving commission', they proceeded to arrest upon suspicion no less than forty-nine persons in three days." [38]

One of the printers of the *North Briton*, Dryden Leach, had worked on other numbers of the series but not on Number 45. However, he was arrested during the night, together with his employees, and all of his papers were seized. The messengers did this on the following information: "Mr. Carrington, the messenger, told three other messengers, who executed the warrant, that he had been told by a gentleman, who had been told by another gentleman, that Leach's people printed the paper in question." [39] The actual printer of *Number 45* was finally apprehended and from him it was learned that Wilkes was the author of the pamphlet. Wilkes was forcibly taken into custody, and had all his private papers seized.

The arrested printers brought suit against the messengers for false imprisonment.[40] Chief Justice Pratt, later Lord Camden, held the warrant to be illegal. "To enter a man's house by virtue of a nameless warrant in order to procure evidence," said the Chief Justice, "is worse than the Spanish inquisition; a law under which no Englishman would wish to live an hour." [41] Wilkes then brought suit against Wood, the undersecretary who had superintended the execution of the warrant. In his decision of Wilkes' suit, Pratt declared that the *North Briton* war-

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[38] Lasson, *History and Development of the Fourth Amendment to the U. S. Constitution* (1937), 43.

[39] Letter from Nuthall to Pitt, July 7, 1763, in *Correspondence of William Pitt* (Taylor and Pringle, edd., 1838), II, 230, 233.

[40] *Huckle* v. *Money*, 2 Wils. K. B. 206, 95 Eng. Rep. 768 (1763).

[41] Id. at 207, 769.

rant presented a point of the greatest consequence that he had ever met with in his whole practice, and ruled in favor of the plaintiff:

> *"The defendants claimed a right, under precedents, to force persons' houses, break open escritores, seize their papers, etc., upon a general warrant, where no inventory is made of the things thus taken away, and where no offendors' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."* [42]

A few years later, in 1765, Lord Camden had another opportunity to rule on a similar intrusion and, in so doing, rendered an opinion accepted as a landmark of English liberty. Shortly before the *North Briton* incident, Lord Halifax had issued a warrant to the messengers to search for John Entick, author of the *Monitor or British Freeholder*. The warrant was specific as to person but general as to the possessions. Following the Camden ruling on the *North Briton* warrant, Entick sued in trespass for the seizure of his papers. Camden held the warrant illegal, for "if this point should be determined in favor of the jurisdiction," he said, "the secret cabinets and bureaus of every subject in this kingdom will be thrown open to

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[42] *Wilkes* v. *Wood*, 19 How. St. Tr., col. 1153. Other suits followed. Wilkes later sued Lord Halifax, collecting £4,000. The much abused printer, Dryden Leach, brought suit against the messengers, winning £400. The government defended all actions arising from the warrant and payed all judgments. The expenses incurred were estimated at £100,000. See May, *Constitutional History of England* (1861), II, 258-59.

the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel."[43]

Camden's decisions against the government were received with much acclaim throughout England and signalled the end of the use of general warrants. Camden became one of the most popular men in the country, and was elevated to the lord chancellorship in 1766. Wilkes and Entick were national heroes. Nor was the response limited to England. "Wilkes and Liberty" became a rallying cry in the oppressed Colonies. There, the rationale of Lord Camden's opinions had already been anticipated in 1761 in James Otis' historic challenge to the colonial writs of assistance.[44] Speaking of writs of assistance, Otis held that they were "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book."[45] While Camden's declarations of liberty were readily accepted in England, only by force of arms did the colonists ultimately win for themselves the freedom pleaded for by Otis.

The history of centuries of inquisitorial oppression on both sides of the Atlantic was well known to the men who wrote our Constitution, for they had not only resisted it in the Colonies, but their forefathers had fled from it in the mother country. In the victorious Colonies, the Federal Constitution was given its firm foundation by a specific Bill of Rights, whose interrelated guarantees of privacy, due process and political freedom, were intended forever

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[43] *Entick* v. *Carrington*, XIX *State Trials* (Howell) 1029, 1063 (1765).

[44] *Paxton's Case*, Quincy's Mass. Rep. 51 (1761).

[45] See Tudor, *Life of James Otis* (1823), 63.

to preclude arbitrary intrusion on the home, the person, the possessions, the beliefs and the expressions of the citizen.

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Petitioner may have belabored unduly the proposition that no man may be called before a Congressional committee without probable cause to believe that he has information pertinent to the committee's inquiry. If we have in fact unduly belabored this proposition, it was because, as we indicated earlier, the Government has adamantly maintained in the courts below and even in this Court (Brief in Opposition, pp. 10-11), the Subcommittee's right to call the man off the street to compel him to answer questions about Communism.

We respectfully submit that the long line of precedents of this Court, running from *Boyd* and *Brimson* to *Watkins*, *Barenblatt* and *Wilkinson*, leaves no doubt that the Government's man-off-the-street contention must be rejected and the principle adhered to that Congressional committees, like courts, grand juries, federal agencies and the Executive, can neither search a man's mind without probable cause nor seize his person, his possessions or his property on mere surmise or conjecture. And were there no adjudications and statements from this Court dispositive of the Government's contention that Congressional committees may exercise the power of compulsory process without probable cause, that conclusion is equally repelled by the relevant constitutional history which gives life and meaning to Bill of Rights guarantees against arbitrary or unjustified intrusion upon the person, his possessions and his privacy. As we have seen, political tyranny was effectively implemented in pre-revolutionary times in the Colonies and in the mother country by the use of general

warrants and it was just these forms of governmental compulsion which the requirement of probable cause was intended henceforth to preclude.

Accordingly, petitioner having demonstrated the utter untenability of the Government's principal theory—that the Fourth Amendment's requirement of probable cause is inapplicable to Congressional inquiry conducted on pain of contempt—there remains but the afterthought suggestion first enunciated in the District Court's opinion and later espoused as the rationale below, that petitioner's mere employment as a member of the working press or by the New York Times constitutes probable cause for his interrogation by the Subcommittee about possible Communist associations or sympathies. We turn now to a brief consideration of this rationalization of probable cause on what might be called a theory of "guilt by newspapermanship."

B. *The Subcommittee Had no Probable Cause or Reason to Believe that Petitioner Had Information Pertinent to its Inquiry.*

A theory weakly and belatedly suggested in the trial court's opinion and later adopted by the court below, was that "after the important revelations of Winston M. Burdett,[46] it was surely not a 'dragnet' process to call appellant as a member of the working press to check on possible Communist Party activities among his fellow employees" (R. 244).[47] The court below fails to explain why

[46] Quite clearly the calling of petitioner would have been arbitrary, haphazard and dragnet even if Burdett had testified to contemporaneous Communist activity in the press or on the Times. Actually, of course, Burdett testified principally concerning Communism on the Brooklyn Eagle and in the Newspaper Guild 15 years earlier (see n. 1, p. 5, *supra*).

[47] In the text we emphasize that the rationale adopted below, validating the calling of a man off the working press or the New York Times to inquire into possible Communist association or activity, violates constitutional guarantees. However, the adoption below of this rationale is also

it was not "a dragnet process" randomly to exercise the power of compulsory process among 30,000 members of the working press or 5,700 employees of the New York Times (ee n. 5, p. 16, *supra*), on the mere chance or possibility that those subpoenaed might have information concerning Communist activities in the press or on the Times. Neither court below sought to square so sweeping and haphazard a use of compulsory process—a modern version of the odious "general warrant"—with the constitutional prohibition upon unreasonable search or the requirements of probable cause and due process.

We submit that the Fourth Amendment precludes compulsory process in the nature of a fishing expedition for

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defective in two other important respects. These both flow from the fact, as Sourwine himself affirmed (see n. 5, p. 16, *supra*), that the Subcommittee did *not* call petitioner because he was a member of the press or of the Times, a rationale which was never suggested in this case until the trial judge rendered his opinion.

First, we do not believe that a District Court can validate the Congressional process being vindicated by prosecution for contempt upon a *different theory* from that under which the Subcommittee actually issued its process and sought to enforce it. While no precisely applicable case in point has been found, the lower courts' validation of Congressional process on a theory never pursued by the Subcommittee is at odds with two lines of this Court's adjudications represented by *Securities Comm'n.* v. *Chenery Corp.*, 318 U.S. 80, and *Service* v. *Dulles*, 354 U.S. 363. Both of these authorities and the cases which follow them stand against the judicial validation of the action of a coordinate branch of the Government on a theory different from that actually pursued by the coordinate branch. Judicial substitution seems equally impermissible when the courts are asked to enforce Congressional process by use of a theory under which Congress has not yet issued its process.

Second, even if judicial substitution were permitted, the substitution came too late in this case, for the alternative theory of the validity of the subpoena in this case was never suggested until the District Court's verdict. Far from suggesting it, the evidence of Subcommittee counsel Sourwine (n. 5, p. 16 *supra*) repelled the expansive theory that the Committee would call any member of the press or the Times at random. In these circumstances, we suggest that this Court's ruling in *Giordenello* v. *United States*, 357 U.S. 480, bars affirmance of petitioner's conviction on a theory he had no opportunity to rebut at his trial, since it was never there suggested prior to the verdict.

pertinent revelations, whether applied to the man off "the working press" or "The New York Times." This Court cannot accept the rationale adopted below without turning its back upon the constitutional history which lies at the foundation of the Bill of Rights, particularly the rejection of general warrants in *Wilkes* v. *Wood* and *Entick* v. *Carrington*, rulings which are part and parcel of our own guarantees against arbitrary or unreasonable governmental intrusion. See *Boyd* v. *United States*, 116 U.S. 616; *Marcus* v. *Search Warrants*, 367 U.S. 717.

A Congressional warrant for any or all members of the working press or any or all New York Times employees to check on "possible Communist Party activities" among fellow employees (R. 244) is as general and dragnet in nature as was the Star Chamber and High Commission process or the warrant for the unnamed printers of the *North Briton*. If haphazard inquisition for Communists among presumably innocent members of the press or employees of the Times is not dragnet inquiry, then it is difficult to conceive of any inquiry which is.[48] Neither the Fourth Amendment nor Fifth Amendment due process permit the haphazard use of Congressional subpoena power on the off chance that the witness, called at random from among thousands of newspapermen, may have information about Communist activity in the press.

Finally, it cannot be disregarded that to the grievous

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[48] We respectfully suggest that the court below failed to see the true dimensions of its own holding. For there is no industry or profession in America today as to which someone has not charged some degree of Communist infiltration, and thus, any person in any industry or profession could be called under the boundless theory adopted below. And, if the theory of the court below should conceivably be validated, then on the same theory general warrants could be issued in any city where a Communist had been identified or in any political movement or in any other form of association. Thus the decision below, while employing slightly different terminology, has the obvious effect of validating the Government's man-off-the-street theory.

violation of Fourth and Fifth Amendment procedural guarantees, there is added in this case the Subcommittee's invasion of First Amendment substantive protections, which underlines the double necessity for adherence to procedural requirements. This coalescence of procedural and substantive constitutional violations will come as no surprise to this Court. Summarizing the pertinent constitutional history, the Court recently recalled in *Marcus* v. *Search Warrants*, 367 U.S. 717, 729, that "*The bill of rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.*" Unlike ordinary offenses consisting of consummated acts, "political offenses" generally involve beliefs, assocations, tendencies and expressions. The pre-Revolutionary British history illustrates the indispensable interplay between dragnet inquiry into such intangible offenses as seditious or heretical association, belief or expression, and the dragnet or general search power by which such political heresy is effectively rooted out. The arbitrary interrogation of this petitioner in the course of the Subcommittee's New York Times investigation of 1956, is a current illustration of the functional relationship between invasions of personal privacy and intrusion upon freedoms of speech, press and assembly. Nor is there any question that the Subcommittee's intrusion had both the purpose and effect of restraining the free exercise of rights of speech and press.

C. The Subcommittee's Intrusion on First Amendment Liberties.

While the hearing record is replete with protestations that the Subcommittee was not investigating the press or the Times, but merely Communist influence therein, the full record demonstrates the contrary. In its interroga-

tion of Times witnesses, the Subcommittee certainly did not restrict itself to questions about Communist Party membership and activity, but ranged widely into personal and private affairs.[49] Indeed, there is evidence (see R. 145-168) that the New York Times was consciously selected by Sourwine and Chairman Eastland as a Subcommittee target. For example, 30 of the 38 witnesses called at the 1955 executive hearing were or had been connected with the Times and 15 out of 18 witnesses called at the 1956 public hearing were so connected (R. 145-149). In addition, Times witnesses were repeatedly asked about their employment status and conversations with the Times since the time the Subcommittee had first called the witness, questions which could have no other purpose or effect than to embarrass the Times as to those already discharged and coerce it as to those yet retained. See Hearings, *Strategy and Tactics of World Communism*, before the Senate Internal Security Subcommittee, 84th Cong. 2nd Sess., Part 17, pp. 1642, 1727, 1731-32, 1754-55, 1757-60, 1774, 1782-83, 1785-86.[50]

While it is commendable that the New York Times has retained this petitioner in its employ, the impact of the Subcommittee's investigation of the press cannot be measured by the courage of its most powerful representative. The content of the press is shaped by persons who write

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[49] See e.g. R. 85-86 and interrogations of Alden Whitman (No. 10) and James S. Glaser (Hearings, Part 17, pp. 1589 et seq.).

[50] Nor can the infringement on First Amendment rights be taken out of the context of the entire questioning to which petitioner was subjected. When petitioner read a respectful statement explaining why he thought he was within his rights in refusing to answer some of the questions addressed to him, the Subcommittee subjected him to needless humiliation and embarrassment. It asked him if he knew his counsel, a distinguished non-Communist civil libertarian, to be a Communist (R. 59-60). It demanded to know who had helped him in writing the statement he made to the Subcommittee (R. 63-64, 92) and it further demanded to know the content of private conversations he had with his employers at the New York Times (R. 94-95).

the news. The inevitable effect of wholesale interrogation and exposure of any alleged Communists or others the Subcommittee could find on the New York Times, is necessarily to discourage newspapers from hiring persons of unpopular, unorthodox, or minority views, past or present, who may become the subjects of similar Congressional scrutiny. The resulting elimination of persons from the press who hold or held minority views, is as effective a form of censorship and restraint as the deletion of the material they could contribute to the press.

In *Watkins* v. *United States*, 354 U.S. 178, 197, this Court provided pertinent reminder of the First Amendment's applicability to Congressional investigation: "Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of law-making. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by law-making." And, to emphasize its concern, the Court referred to the necessary "accommodation of the Congressional need for particular information with the individual and personal interest in privacy", and concluded (at 198) that "*the critical element is the existence of, and weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness.*" Whatever might be said of the impact of the First Amendment when the Subcommittee questioned other witnesses in its New York Times hearing (as to whom it might have had reason to believe them possessed of pertinent information),[51] clearly the First

[51] While we recognize that since *Watkins* this Court has given considerable scope to the Congressional need for information in its balancing of that need against First Amendment protections (see *Barenblatt* and

Amendment imposes an insuperable bar to affirmance of this petitioner's conviction. *Lacking any probable cause or reason to believe Shelton to have pertinent information on the Subcommittee's inquiry, there is no "Congressional need" presented here for "accommodation . . . with the individual and personal interest in privacy."* There can be no Congressional need for the testimony of a victim of accident. And if, as this Court explained in *Watkins*, "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness", here the Court cannot properly give any weight to a Congressional "interest" in demanding disclosure by any or every member of the working press to check on "possible Communist Party activities among his fellow employees".

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The undeniably repressive effect upon First Amendment freedoms of an investigation such as the Subcommittee's 1956 New York Times inquiry, underlines the importance of holding Congressional hearings to accepted constitutional and statutory standards of procedural fair-

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Wilkinson, supra), each investigation must of course be separately viewed under the *Watkins* test. Thus viewed, the Internal Security Subcommittee's January 1956 New York Times hearing infringed more directly upon First Amendment protections and was less justified by a showing of Congressional need than any similar inquiry previously before this Court. No one has ever suggested, even Mr. Scarwine (R. 149), that the Communists ever had any measure of success in subverting the Times to the cause of Communism. Thus, all apart from the unique circumstances under which the First Amendment question arises with respect to petitioner Shelton, we respectfully suggest that if this Court's *Watkins* requirement of a judicial balancing of Congressional need against the First Amendment has any vitality, the New York Times hearing of 1956 intruded too far and with too little justification to withstand the force of the First Amendment.

ness.[52] Whether the Subcommittee's interrogation of petitioner be deemed violative of Fourth, Fifth or First Amendment rights taken separately or together (or of the contempt statute's requirement of pertinency),[53] it is clear that federal courts cannot, through contempt convictions, vindicate Congressional process under which newspapermen are arbitrarily called and questioned about Communism without reason to believe that they have pertinent information on that subject.

But were these compelling considerations not wholly dispositive of the case at bar, there remain additional defects in the proceedings below, particularly in the violation of the ruling in *Watkins* concerning a necessary and defined "question under inquiry." We turn now to consideration of these additional questions.

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[52] This Court has often affirmed the special importance of full adherence to procedural requirements in areas of potential infringement upon First Amendment liberties. Thus, the Fifth and Sixth Amendment requirement of definiteness in criminal enactments has been given additional significance by this Court in cases involving the exercise of First Amendment rights. See *Smith* v. *California*, 361 U.S. 147; *Winters* v. *New York*, 333 U.S. 507, 509-10; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Thornhill* v. *Alabama*, 310 U.S. 88; *Herndon* v. *Lowry*, 301 U.S. 242; *Stromberg* v. *California*, 283 U.S. 359. Whatever might be said of Congressional inquiry without probable cause in other areas, where as here the investigation directly concerns speech, press and association, dragnet process is doubly barred by the Bill of Rights.

[53] While we have emphasized in the text the constitutional objections to compulsory "fishing expeditions" by Congressional committees, we suggest that the same circumstances which give rise to the constitutional violation herein likewise require the conclusion that the Subcommittee's interrogation of petitioner, without reason to believe him possessed of relevant information on its inquiry, preclude a finding that within the meaning of 2 U.S.C. 192 the questions involved were "pertinent to the question under inquiry" before the Subcommittee. Thus, in *United States* v. *Orman*, 207 F. 2d 148, 154-55, the Third Circuit made clear that Congressional investigations "in the mere hope of stumbling upon valuable information" would not support contempt citations, for "the United States in a contempt proceeding must prove . . . the relation of the questions, the documents and the particular witness to the investigation."

II

Contrary to Constitutional Due Process and Statutory Requirements There Was No Delimited "Question Under Inquiry" Before the Subcommittee at the Time of Petitioner's Appearance.

1. No delimited inquiry such as required by this Court's *Watkins* ruling, was made apparent to petitioner when he was questioned by the Subcommittee. The difficulties in this case concerning the nature of the "question under inquiry" in petitioner's interrogation began with the inquiry, were exacerbated at the trial, and remain unanswered even after judgment in the Court of Appeals.[54] As we have demonstrated (see *supra*, pp. 17 to 21), successively different definitions of the question under inquiry were given by Senator Eastland and by Senator Hennings at the hearing; by the Assistant United States Attorney in response to a requested bill of particulars; by Government witness Sourwine at the trial; and by the lower court opinions. Certainly, where the views of the Subcommittee members and of the prosecution, the trial evidence, and the findings of the lower courts on the "question under inquiry"

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[54] The opinion below suggests that petitioner failed to inquire of the Subcommittee concerning the "question under inquiry" and that the Subcommittee therefore had no obligation to make the point luminous to him. But prior to being sworn at the 1956 hearing, petitioner challenged the jurisdiction of the Subcommittee on the grounds that the Subcommittee knew it could *"obtain no information from me that could possibly assist it in any legislative purpose"* and said, *"I fail to see why I am involved in this hearing, which the chairman said on Wednesday stems from the Burdett testimony. There was no reference to me in the Burdett testimony . . ."* (R. 84). If such an initial challenge, followed by specific objection to the jurisdiction of the Subcommittee at the time of refusals to answer, did not place upon the Subcommittee the duty of enlightening petitioner as to the "question under inquiry", then a Congressional witness has truly become a pawn in a battle of legal niceties.

are as diverse and inconsistent as in the instant case, it cannot be said that the point was made sufficiently luminous to the witness at the time of the Subcommittee interrogation to meet constitutional due process requirements. As this Court ruled in *Watkins* (354 U.S. at 208-9):

> "The problem attains proportion when viewed from the standpoint of the witness who appears before a congressional committee . . . It is obvious that a person compelled to make this choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense."[55]

In sum, the hopeless and continuing confusion reflected on all sides demonstrates the utter lack of any delimited subject of investigation to which petitioner might have related the pertinence of the questions at the time they were addressed to him. That, indeed, is the ruling regarding this very New York Times inquiry of the Subcommittee, rendered by Judge Youngdahl in *United States* v. *Peck*, 154 F. Supp. 603, 611:

> "That the question under inquiry was not 'luminous' to the witness is the result of the precise defects in the method of exercising legislative authority which

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[55] See also *Scull* v. *Virginia*, 359 U.S. 344. Mr. Justice Harlan and Mr. Justice Frankfurter recently gave voice in their dissenting opinion in *Deutch* v. *United States*, 367 U.S. 456, 473, to a principle which we believe commands the approval of the entire Court and which is equally controlling here, where the trial evidence demonstrates different "questions under inquiry" from those enumerated at the Subcommittee's hearing:

> "it would be obviously unfair to allow the Government at trial to prove pertinency on a different theory than was given to the defendant at the time he testified, and on the basis of which he presumably determined that he need not answer the question put."

were involved in Watkins. In this case, too, 'there is a wide gulf between the responsibility for the use of investigative power and the actual exercise of that power.' In this case, too, the Subcommittee ranged over many subjects during the course of its investigations, did not clearly establish any lines of demarcation between series of investigations, and did not restrict its questioning of the witnesses to any one field. The witness could not be aware of the subject under inquiry because there was no subject, except for the broad, vague, general authority of the Subcommittee."

Shelton and Peck were not the only witnesses at the New York Times hearing as to whom the question under inquiry was not made luminous. This Court will find from the records in *Whitman* (No. 10) and *Price* (No. 12) similar confusion concerning the question under inquiry by this Subcommittee. For the convenience of the Court, we have attached an Appendix (p. 67, *infra*) summarizing the utter confusion reflected at each stage of these four proceedings concerning the question or questions under inquiry. Whether it was because the Subcommittee did not yet have the guidance of the *Watkins* decision, or whether it was because the Subcommittee's primary interest was in the coercion of the New York Times, we respectfully submit that no one, from witnesses to Subcommittee counsel, from prosecutor to Subcommittee members, had the vaguest idea of any actual delimited question under inquiry in the January, 1956 hearing of the Subcommittee. Petition's interrogation having had no discernable and delimited subject, due process prevents his conviction for contempt.

2. Whether a sufficiently delimited inquiry was made manifest when petitioner was questioned need not be decided, for here the Government's bill of particulars on the

"question under inquiry" to be proved under 2 U.S.C. § 192 calls directly into play this Court's *Watkins* holding that a general authorizing resolution is not itself sufficiently precise to serve as a "question under inquiry." In the District Court the prosecution, by its bill of particulars, elected to rely on precisely such a broad authorizing resolution (Senate Resolution 366) *and no lesser inquiry* as the "question under inquiry" to be proved under the indictment.[56] While both courts below sought to find a more limited inquiry—Communist influence on the Times or in communications—the bill of particulars is, of course, binding for the proposition that no such limited question under inquiry was being pursued by the Subcommittee in its interrogation of petitioner. See, e.g. *United States* v. *Neff*, 212 F.2d 297, 309. The only remaining question is whether Section 3 of Senate Resolution 366 (see p. 3, *supra*) has the specificity which this Court ruled in *Watkins* was lacking in the House Un-American Activities Committee au-

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[56] The Assistant United States Attorney gave his bill of particulars in open court regarding the "question under inquiry", stating (R. 20):

> "the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.
>
> "This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose . . ."

Earlier, the United States Attorney had stated his theory that "For the defendant to know what particular inquiry may have been uppermost in the minds of the committee, without restricting its general authority, would be of no help because the pertinency of the question asked would be as broad as the authority which the committee had, and that is stated in the resolution itself . . . " (R. 17).

Surprisingly, in opposing the grant of certiorari the Government suggested that the bill of particulars on the question under inquiry point was only "an oral statement" made in reference to another matter. In a supplemental memorandum for the United States later filed, after petitioner had pointed out this gross inaccuracy, the Government confessed that it "was incorrect" and in "error" in having suggested that there was no bill of particulars on the question under inquiry point (pp. 2-3). We deem it settled for the remainder of this case that the bill of particulars in fact disavowed any narrower question under inquiry than the Subcommittee's authorizing resolution.

thorizing resolution. Even cursory comparison of the two texts is sufficient to demonstrate that the almost identical substance of the Senate Resolution is no more precise as a "question under inquiry" than is that of the House.

Thus the exact holding of *Watkins* that a general authorizing resolution does not constitute a sufficiently delimited "question under inquiry" is controlling in the instant case. And so, it should be noted, is this Court's more recent ruling in *Deutch* v. *United States*, 367 U.S. 456. For if there was no delimited question under inquiry before the Subcommittee at the time of the witness's appearance, then the Government has necessarily failed to meet its burden under 2 U.S.C. § 192 of showing that the unanswered questions were "pertinent to the question under inquiry." Without a subject under inquiry, the Government cannot establish the pertinency of the Subcommittee's questions.[87]

A construction which permits a Congressional committee to compel testimony without a defined subject of investigation would place every witness in the position which one member of the Subcommittee frankly stated to be the position of this petitioner. We believe the point here urged upon the Court was nowhere better stated than by then Subcommittee Chairman Hennings, in a colloquy at petitioner's first interrogation (R. 60, emphasis supplied):

> "Mr. Fraenkel. The witness has stated he does not consider the question pertinent, nor do I. I would

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[87] All apart from considerations of fair notice to the witness at the time of the hearing, petitioner's conviction cannot stand where, as here, the Judge found the "question under inquiry", an element of the offense charged, to be *other* than the "question under inquiry" to which the Government bound itself by its answer to the bill of particulars. See R. 199-200, *United States* v. *Neff*, 212 F. 2d 297, 309-310. The Judge could not properly find as proven a material fact which the Government was estopped from proving under its bill of particulars. Cf. *Giordenello* v. *United States*, 357 U.S. 480.

advise him, as his lawyer, that he is not obliged to answer such a question.

"Senator Hennings. Then you are advising him not to answer on the ground that the question is lacking in relevancy or pertinence?

"Mr. Fraenkel. This is right.

"Senator Hennings. *The Chair might observe, sir, that it would seem to me rather difficult for you to determine as counsel or for this witness to determine what is relevant or what is pertinent to the subject matter of the entire inquiry.*"

It was exactly this inability of the witness to determine pertinency to the question under inquiry which *Watkins* was intended to prevent.

We are confident that this Court will recognize, as readily as did Subcommittee Chairman Hennings, petitioner's difficulty in determining how the questions addressed to him might be pertinent to the scope of the Subcommittee's diffuse and discursive inquiry. *We respectfully submit that, whether the vagueness of the proceedings be viewed as of the time of petitioner's interrogation or as of the time of his trial under the bill of particulars, there was no "question under inquiry" sufficient either to meet his due process rights at the hearing or to justify his conviction at the trial.*

III

Petitioner's Conviction Must Be Reversed Because the Indictment Failed to State the "Question Under Inquiry"

The indictment against Robert Shelton stated only generally that as a witness before a Congressional subcommittee he was asked questions "which were pertinent to the question then under inquiry" and "refused to answer those pertinent questions" (R. 1). Petitioner's mo-

tion to dismiss because the indictment fails to set forth the question under inquiry was denied (R. 19) and the Court of Appeals affirmed on this point (R. 242). For the sake of brevity and the convenience of the Court, petitioner Shelton relies on Argument II of the brief for petitioner in *Russell* v. *United States* (No. 8) and requests reversal on the authorities there presented.

IV

Petitioner Was Deprived of His Right to a Fair and Impartial Grand Jury

The grand jury records show that fourteen of the twenty-three members of the grand jury which voted the indictment against petitioner were, at that time, employed by the United States Government (R. 4). The intimidatory impact of nine years of operation of loyalty-security programs and the frightening effect of the McCarthy hearings on government employees as a class (R. 6) was more than sufficient to bar the fourteen government employees (a majority of the grand jury) from participation in its deliberations and requires the dismissal of the indictment. Petitioner Shelton, for the sake of brevity and the convenience of the Court, relies on Argument I of the brief for petitioner in *Russell* v. *United States* (No. 8). In both cases a majority of the grand jury (thirteen in *Russell*, fourteen here) was composed of government employees and the grand jury sessions were held in Washington, D.C., under the influence of the loyalty-security programs. Under such conditions there seems little doubt that these government employees acting as grand jurors could not give a fair and unbiased judgment to an individual accused on charges involving alleged Communism and the indictment must therefore be dismissed.

Conclusion

Nowhere are the procedural guarantees of the Bill of Rights more applicable and more important than in areas of potential intrusion upon First Amendment liberties. As this Court stated in its recent decision in *Scull* v. *Virginia*, 359 U.S. 344, 353, in reversing a legislative contempt conviction for vagueness, "certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press and association . . ." In this case, from the moment that petitioner was served with a subpoena for "Willard Shelton or Robert Shelton", vagueness has attended every aspect of the proceedings.

It was unclear at petitioner's first interrogation why he was subpoenaed at all, and what question was then under inquiry—whether, as Committee Counsel stated it, "a question of identity" alone was involved or what. It is equally unclear why petitioner was interrogated a second time and on what subject of inquiry.

And at petitioner's trial, additional uncertainties were injected. The Government affirmed in a bill of particulars that the entire vague Subcommittee resolution was the "question under inquiry" and then proceeded to introduce evidence as to the question under inquiry directly contrary to that bill of particulars. The Government sought to justify the contempt conviction on the expansive theory that the Internal Security Subcommittee can call and question "a man off the street" about Communist activity—even though the Government's principal witness testified that the Subcommittee had not acted on any such theory. Additional uncertainty was injected by the courts below, which sought to excuse petitioner's interrogation on an elastic rationale of probable cause (general inquisition for Communism among newspaper employees) never pursued by the Subcommittee itself. Finally, the courts below es-

poused a "question under inquiry" at petitioner's interrogation which is contrary to *both* the bill of particulars and to the Government's evidence at trial.

Whatever constitutional or statutory basis be selected as the one most clearly offended by this series of flabby inconsistencies, fundamental fairness and certainty of legal process were here clearly transgressed in a sensitive First Amendment area. Criminality cannot be affirmed where essential elements thereof are so fraught with uncertainty and contradiction. Accordingly we urge that the decision below should be reversed and a judgment of acquittal entered in petitioner's case.

Respectfully submitted,

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APPENDIX A

SUMMARY OF ALLEGED QUESTIONS UNDER INQUIRY

	SHELTON	WHITMAN	PRICE	PECK
STATEMENTS OF COMMITTEE MEMBERS BEFORE HEARINGS (Not in Presence of Present Petitioners)	"Subsequent chapter to the Burdett testimony [1]—"not an attack upon the free press" [2]—attempt of Communist party to influence or subvert American press [3]—"We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it" [4].			
STATEMENTS BY COMMITTEE COUNSEL SOURWINE TO OTHER WITNESSES	*Not* investigation into "Communist infiltration of the press and other forms of communication" [5]—"the subject matter of the Committee's inquiry is Communist activity" [6].			
STATEMENTS BY COMMITTEE TO WITNESSES (Open Hearings)	"Your employment" [7]—"Whether you are a member of the conspiracy to destroy the government of the United States" [8]—credibility of witness [9].	"Your standing and influence in the organization" [New York Times] [10]—membership of Communist cell in New York City in 1930's [11]—"who your associates were in the Communist Party" [12].	To qualify witness to answer questions regarding slate of candidates in Newspaper Guild election [13]—testing the credibility of the witness. [14]	No explanation to witness. [15]
INDICTMENTS	Question under inquiry not stated.	Question under inquiry not stated.	Question under inquiry not stated.	Question under inquiry not stated.
STATEMENTS OF PROSECUTOR	"the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted. This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose." [16]	Communist activities in New York area in the field of strategy and tactics of world communism—"internal security and national security of the United States" [17].	"rout out communists and locate them wherever they are" [18]—"find where communists were, wherever they may be found" [19]. Powers of subcommittee "at least as broad as any that the full committee had already and perhaps a little more broad" [20].	"'The full committee powers' or the entire scope of the authorizing resolution" [21].
TESTIMONY OF COMMITTEE COUNSEL	"extent and activities of the communist conspiract against the United States, more specifically, as it applied to New York area, and on the particular day he testified, and with regard to his testimony, still more specifically within that broader area, and we endeavored to get information about communist activity in the New York Times or in connection with employees of the New York Times or by such employees." [22] "Communist activity and infiltration of mass communications in New York City". [23]	Communist espionage—operations of the Communist Party—strategy and tactics of world communism particularly in area of mass communications [24]—conspiracy to overthrow the government of the United States by force and violence [25].	Strategy and tactics of Communist Party [26]—important whether witness had signed in 1941 a statement in defense of the Communist Party [27]—Not lawful political activities of members of Communist Party [28].	"We were after each Communist cell that we could find in any industry in the United States, and we were after them to get a picture of it as a basis for legislation" [29].
DETERMINATIONS BY TRIAL COURTS	"extent and nature of communist infiltration into news dispensing agencies" [30].	"the growth or the decline of the Communist Party and its numerical strength at various times as part of an inquiry into the extent of the activities of the Communist Party and the legislative means that might be appropriate for dealing with such activities" [31].	Court refers only to "the internal security; in fact the national security, of this country" [32].	"Communist infiltration into mass communications". [33]
GOVERNMENT BRIEFS IN COURT OF APPEALS	Government relies entirely on Senate resolution and statements made before the hear-	Communism [34].	Government relies entirely on Senate resolution and statements made before the hear-	Acquitted.

	tion about communist activity in the New York Times or in connection with employees of the New York Times or by such employees."[22] "Communist activity and infiltration of mass communications in New York City".[23]			
DETERMINATIONS BY TRIAL COURTS	"extent and nature of communist infiltration into news dispensing agencies"[29].	"the growth or the decline of the Communist Party and its numerical strength at various times as part of an inquiry into the extent of the activities of the Communist Party and the legislative means that might be appropriate for dealing with such activities"[31].	Court refers only to "the internal security; in fact the national security, of this country"[32].	"Communist infiltration into mass communications".[33]
GOVERNMENT BRIEFS IN COURT OF APPEALS	Government relies entirely on Senate resolution and statements made before the hearings[34].	Communism[35].	Government relies entirely on Senate resolution and statements made before the hearings[36].	Acquitted.
DECISIONS OF COURT OF APPEALS	"infiltration of Communists into the radio, TV, and the press."[37]	Mechanics of party membership[38].	Not stated[39].	Acquitted.

[1] Hearings, page 1587.
[2], [3], [4] Ibid.
[5] Hearings, page 1616 (colloquy during testimony of James S. Glaser).
[6] Hearings, page 1652 (colloquy during testimony of Jerry Zalph).
[7] Hearings, page 1721 (R. No. 9, page 85).
[8] Hearings, page 1725 (R. No. 9, page 91).
[9] Hearings, page 1727 (R. No. 9, page 93).
[10] Hearings, page 1730.
[11] Hearings, page 1737. Chairman stated this to be "The very heart of this inquiry."
[12] Hearings, page 1738.
[13] Hearings, page 1681.
[14] Hearings, pages 1695–6.
[15] Hearings, pages 1774–1784.
[16] Prosecutor's oral Bill of Particulars (R. No. 9, page 20). See also R. 17–18, 40.
[17] Transcript *United States* v. *Whitman* (Criminal 1213–56 DC DC) p. 6.
[18] Joint Appendix (J.A.) No. 12, p. 133.
[19] Id., p. 134.
[20] Id., p. 49.
[21] Quote in *United States* v. *Peck*, 154 F. Supp. 603, 610, note 25.
[22] R. No. 9, page 139.
[23] R. No. 9, pages 156–7.
[24] J. A. No. 10, p. 31.
[25] Id., p. 32–33.
[26] J. A. No. 12, p. 54.
[27] Id., p. 103. (See also pp. 117–18, 127 and 128.)
[28] Id., p. 80.
[29] Transcript in *United States* v. *Peck*, Criminal 1214–56, page 235 (testimony of Senator Eastland, Chairman of Committee).
[30] R. No. 9, pages 224–5.
[31] J. A. No. 10, p. 54–55.
[32] Tr. 331-2 of trial record in *United States* v. *Price* (DCDC).
[33] *United States* v. *Peck*, 154 F. Supp. 603, 610, note 25.
[34] Brief for Appellee, *Shelton* v. *United States* (CADC 13737, pages 2–4).
[35] Brief for Appellee, *Whitman* v. *United States*, (CADC 15416, pages 10–11, 13, 14).
[36] Brief for Appellee, *Price* v. *United States*, (CADC 13925, pp. 2, 4 and 20).
[37] R. No. 9, page 243.
[38] *Whitman* v. *United States*, 281 F. 2d 59, 61. This determination was made with regard to question no. 8 in the indictment. The Prosecutor had told the District Court that the purpose of this question was to test the credibility of the witness. The Court of Appeals did not state what it believed was the purpose of the inquiry generally.
[39] Compare *Deutch* v. *United States*, 367 U.S. 456, 467.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 246

ROBERT SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted to clarify a footnote in the Government's Brief in Opposition (p. 15, fn. 7) which has been discussed in Petitioner's Reply Memorandum (pp. 4–8). We will therefore not address ourselves to petitioner's contentions, in his Reply Memorandum (pp. 2–4), concerning the issue of probable cause raised in this case. This matter has been fully covered in the Brief in Opposition (pp. 8–11).

In its Brief in Opposition, the government (pp. 13–15) answered petitioner's contention that the subcommittee had not apprised petitioner of the subject under inquiry. The government contended (1) that petitioner had failed to make a clear objection to the pertinency of the questions which he refused to an-

swer as required by *Barenblatt* v. *United States*, 360 U.S. 109, 124, and (2) that the record of the subcommittee hearings fully supported the finding of the district court, which was affirmed by the court of appeals, that petitioner was aware at the time he appeared before the subcommittee that the subject under inquiry was Communist infiltration of the press.

In a footnote (p. 15, fn. 7) the government replied to petitioner's claim (Pet. 26–27) that an Assistant United States Attorney had stated in the district court in a bill of particulars that the subject under inquiry was that stated in the authorizing resolution as to Communist activities generally, not the lesser inquiry of Communist infiltration in the newspaper field. This footnote indicated that the "bill of particulars" referred to by petitioner was actually merely an oral statement by the Assistant United States Attorney and that this statement concerned the extent of the subcommittee's authority to investigate, not the actual subject under inquiry. Petitioner, in his Reply Memorandum, challenges these parts of the footnote as "misleading" (p. 5).

We agree with petitioner that the footnote was incorrect and may have been inadvertently misleading. As petitioner points out in his Reply Memorandum and as the record shows (see the Appendix, *infra*, pp. 7–11),[1] the statement of the Assistant United States Attorney was made in lieu of a formal, written bill of

[1] The entire colloquy, as included in the Joint Appendix (pp. 2–6), is set forth in the Appendix, *infra*, pp. 7–11.

particulars. The Assistant United States Attorney specifically said that the subject under inquiry before the subcommittee was the full scope of the authorizing resolution and not a "smaller, more limited inquiry" (see the Appendix, *infra*, p. 10). His statement was devoted to the issue of pertinency and not merely to the subcommittee's authority (as we said in our Brief in Opposition).

Despite, however, the error in the Government's Brief in Opposition, we continue to emphasize that petitioner's basic contention is without substance for the reasons primarily relied upon in that brief. Petitioner did not properly raise this objection because, as the record shows, he was aware of the subject being investigated. In fact, besides the evidence cited in our original brief (pp. 14–15), petitioner's statement (which he read to the subcommittee) concerning his reasons for refusing to answer also demonstrates his awareness that the subject under inquiry was Communist infiltration of the press (see the opinion of the district court, Pet. 42). This statement is devoted almost in entirety to petitioner's objection that the subcommittee's investigation was an interference with freedom of the press.[2]

The statement of the Assistant United States Attorney at the trial did not preclude the government from introducing evidence that the subject under inquiry was Communist infiltration of the press. The

[2] Hearings Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, U.S. Senate, 84th Cong., 2d Sess., Part 17, pp. 1723–1725.

latter subject is merely one portion of the broader subject of Communist activities in general which the resolution authorizes the subcommittee to investigate. Thus, when the subcommittee is investigating the narrower problem of Communist infiltration of the press, it is simultaneously investigating the broader subject which it is authorized to investigate. The introduction of evidence on the narrower problem was therefore consistent with the statement of the Assistant United States Attorney that the subject under investigation was the full scope of the subcommittee's authority.

While the Assistant United States Attorney did state that there was no "smaller, more limited inquiry being conducted" (*infra*, p. 10), he apparently meant that the subcommittee was not *restricted* to showing any inquiry less than the full authorizing resolution. In fact, he specifically said that his remarks as to the exact subject under inquiry should not be taken to limit the scope of the government's proof at the subsequent trial (*infra*, p. 8):

> That [the subject under inquiry] is a matter of fact that will come out at the trial and the proof. [Petitioner] is not entitled to have it in advance because the authority that this subcommittee was acting under is found in the resolution which I have already referred to, and there is no particularly defined inquiry less than the full authority to which this committee was restricted at this particular hearing.

Thus, the oral statement was not binding on the government so as to restrict the exact subject under inquiry which the government intended to prove.

In any event, even if it can be said that there was a variance between the prosecutor's oral statement as to the subject of the inquiry and the proof introduced at petitioner's trial, the variance would not be a material one. The crucial question when there is such a variance is whether the defendant has been prejudiced. See *United States* v. *Costello,* 221 F. 2d 668, 675 (C.A. 2), affirmed, 350 U.S. 359; *Neal* v. *United States,* 185 F. 2d 441 (C.A. D.C.), certiorari denied, 340 U.S. 937; *Shayne* v. *United States,* 255 F. 2d 739, 743–744 (C.A. 9), certiorari denied, 358 U.S. 823; *McKenna* v. *United States,* 232 F. 2d 431, 436–437 (C.A. 8). Here, petitioner does not claim and has never shown surprise or any other basis for prejudice.[3]

CONCLUSION

It is respectfully submitted that, for the foregoing reasons and those stated in the Government's Brief in Opposition, the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1960.

[3] The variance here, if any, was not nearly so great as that in *Stirone* v. *United States,* 361 U.S. 212. Moreover, a variance between the indictment and the proof introduced is considerably more serious than a variance between the bill of particulars or binding oral statement and such proof. The grand jury might not have been willing to return an indictment with a charge conforming to the proof actually introduced. Thus, potential prejudice is more likely to be inherent in a variance with an indictment. On the other hand, since the trial court could have allowed amendment of the bill of particulars even during the trial, substantial prejudice must be shown as to any variance with a bill of particulars.

APPENDIX

The following statements appear at pp. 2–6 of the Joint Appendix:

Mr. SILARD.

* * * * *

I would like to ask Your Honor if he feels that the indictment is nevertheless sufficient, to consider the possibility of a bill of particulars so that we may know before trial what authority this committee presumed to exercise, what the scope and nature of the grant of that authority was and what the nature of the inquiry was, because as of now we stand helpless to know what these questions were pertinent to, what the inquiry was, who authorized the inquiry, and what the scope of the authority of the committee was.

* * * * *

Mr. HITZ. Your Honor, the indictment sets out the authority for this committee to act; most particularly, Senate Resolution 366 is the resolution of Congress which expands very slightly the authority which was given to this committee, that is, the Committee on the Judiciary by the Reorganization Act of 1946. This special resolution is one which gives this committee or any duly authorized subcommittee the authority to make investigations for legislative purposes in the field of subversive activities. That can, of course, be obtained by anyone who is interested in it from the Senate of the United States.

We cite it and it can be obtained. That will, of course, outline the authority of this particular committee.

We state in the indictment that the Internal Security Subcommittee, briefly put, was the body of the Judiciary Committee which was conducting the particular hearings under the resolution which gave these powers to the full committee and, when we state in the fourth line that this subcommittee of the full committee was conducting hearings pursuant to the authority which created this power in the committee, we are, of course, stating that they were conducting hearings which properly were before that committee. That is the conclusion, of course, from what we have stated here.

When we state that the questions which were refused of answer were pertinent to the inquiry which was being conducted, we are, of course, stating these were proper questions and that it was before an inquiry which was authorized by the resolution.

The COURT. Defense counsel's point there is that you do not state what the inquiry was about.

Mr. HITZ. That is right.

The COURT. What do you say about that?

Mr. HITZ. That is a matter of fact that will come out at the trial and the proof. He is not entitled to have it in advance because the authority that this subcommittee was acting under is found in the resolution which I have already referred to, and there is no particularly defined inquiry less than the full authority to which this committee was restricted at this particular hearing.

The COURT. I notice that Count 1 attempts to indicate that the subject of communism was being inquired into. Does the resolution creating the committee and the subcommittee authorize the subcommittee to investigate communism?

Mr. HITZ. Not in so many words. In general, it does.

The COURT. The subject was within the general jurisdiction?

Mr. HITZ. Yes. It comes in part 3 of the resolution which states, "the extent, nature and effects of subversive activities in the United States" and so forth. That, of course, embraces communism.

Let us assume that the particular inquiry at the moment might have been subversive activities in the field of education. That does not limit and does not restrict the full authority that was granted to this committee by the resolution and, therefore, the committee, through this subcommittee, could make all inquiries that were authorized by it to make. For the defendant to know what particular inquiry may have been uppermost in the minds of the committee, without restricting its general authority, would be of no help because the pertinency of the question asked would be as broad as the authority which the committee had, and that is stated in the resolution itself which may be obtained, so that we say not only is the indictment sufficient as it stands to charge the offense, but it is sufficient, without further particularization, to inform the defendant of the charge that he must meet and to protect him from a second prosecution.

* * * * *

The COURT. I am not going to pass on an informal request for a bill of particulars unless the Government consents that the matter be handled that way, because the Government is entitled to notice of such an application and is entitled to give it consideration.

Mr. HITZ. I will waive written notice of the bill of particulars, if Your Honor would care to hear it orally from counsel.

The COURT. I shall be glad to hear it.

Very well, I will hear your application.

Mr. SILARD. The request of the bill is for the same information as the first point of our motion to dismiss, that is, for the specific authority under which the subcommittee was said to

be conducting hearings and, secondly, for the nature of the question under inquiry before said committee.

The COURT. What do you say about that, Mr. Hitz?

Mr. HITZ. The resolution, No. 366, provides in two places for the duties of the full committee which were authorized by this particular resolution to be carried on by any duly authorized subcommittee thereof.

In that sense, I am supplying at this moment the authority for the subcommittee named in the indictment to carry on the purposes of the full committee contained in the resolution.

We will prove, at a later time, the transfer of the authority contained in this particular resolution from the full committee to the subcommittee.

As to the second asking, the Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.

This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose so that, in that sense, the asking No. 2 of counsel will be supplied by his reading the resolution.

The COURT. It seems to the Court that the Government has supplied the bill of particulars orally.

Mr. SILARD. Except in this one sense: that I asked, in by motion to dismiss—perhaps I didn't do it well—the nature and scope of the grant to this committee. That has not been given to us.

The COURT. I think it has been sufficiently given.

I will deny the motion for a bill of particulars in view of the fact that the oral statement just made by counsel for the Government will be sufficient compliance if the motion were granted. You have the particulars.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 9

ROBERT SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 232–244) is reported at 280 F. 2d 701. The opinion of the district court (R. 214–227) is reported at 148 F. Supp. 926.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960 (R. 244). The petition for a writ of certiorari was granted on March 27, 1961 (R. 245; 365 U.S. 857). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was apprised and was aware of the subject under inquiry.

2. Whether a Congressional committee may subpoena a person to testify if it has reasonable basis for believing that he possesses information of value to its investigation and, if so, whether the Internal Security Subcommittee had such information as to petitioner.

3. Whether the Subcommittee's investigation into Communist activities in news media violated petitioner's rights under the First Amendment.

4. Whether a defendant, who is indicted by a grand jury partly composed of federal employees, is entitled to dismissal of the indictment or a hearing on the basis of general allegations that such jurors are biased and afraid as the result of the government security program.

5. Whether the indictment was invalid because it failed to specify the subject under inquiry.

STATUTE AND RESOLUTION INVOLVED

2 U.S.C. 192 (R.S. 102, as amended) and the pertinent provisions of Senate Resolution 366, 81st Cong., 2d Sess. (1950), are set forth in petitioner's brief at pp. 3–4.

STATEMENT

Petitioner was charged in a three-count indictment with having unlawfully refused to answer three questions pertinent to matters under inquiry by the Sub-

committee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary (R. 1–2). Having waived his right to trial by jury (R. 23), petitioner was found guilty by the district court on Counts 1 and 2. Count 3 was dismissed (R. 226). Petitioner was sentenced to six months' imprisonment and to pay a fine of two hundred and fifty dollars on each of the two counts, with the sentences of imprisonment to run concurrently (R. 231).

On appeal, the Court of Appeals for the District of Columbia Circuit ordered that hearings in this and seven other pending contempt of Congress cases—all of which involved refusals to answer questions asked by Congressional committees—"be deferred until after the decision of the Supreme Court in *Barenblatt* v. *United States* * * *." Following the *Barenblatt* decision (360 U.S. 109), the eight cases were assigned to a single panel of the court below, supplemental briefs were ordered filed in each, and oral arguments were heard. On June 18, 1960, the court of appeals reversed the convictions in two of the eight cases, *Knowles* v. *United States* and *Watson* v. *United States*, and unanimously affirmed the convictions in the other six, including that of petitioner. *Shelton* v. *United States; Deutch* v. *United States; Russell* v. *United States; Price* v. *United States; Liveright* v. *United States; Gojack* v. *United States.* This Court granted certiorari in the six latter cases, and at its last Term reversed the conviction in *Deutch* v. *United States* (367 U.S. 456). The other five cases, includ-

ing petitioner's, have been set for oral argument at this Term.

The pertinent facts may be summarized as follows:

On June 28 and 29, 1955, the Senate Internal Security Subcommittee heard the testimony of Winston Burdett, a newspaperman and broadcaster, in connection with its continuing investigation since 1950 into Communist subversion and the operation of the internal security laws (R. 71; Hearings, Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, U.S. Senate [hereafter "Hearings"], 84th Cong., 1st Sess., Part 14, pp. 1324–1363). Burdett, who said that he was a Party member from 1937 until the early 1940's, testified concerning attempts of the Communist Party to influence public opinion by infiltration of Party members into the newspaper field. He stated that he became a member of the Party's unit on the Brooklyn Eagle in 1937 while employed by that newspaper (Hearings, Part 14, p. 1324); that the unit included several reporters and editorial writers (*id.* at pp. 1325–1327, 1359–1360); that Party leaders induced him to become a foreign correspondent for the Eagle in order to use his position to act as an espionage agent for the Soviet Union and that he continued these activities while subsequently employed by Transradio Press and the Columbia Broadcasting System during World War II (*id.* at pp. 1328–1341, 1347–1353); and that employees of other New York newspapers had been Party members around 1940 (*id.* at pp. 1360–1363).

Subsequent to Burdett's testimony, the Subcommittee received information that a man by the name of "Shelton," said to be employed on the editorial or news side of the New York Times, was a member of a Communist group among the staff of that organization, that he was active in the affairs of this group, and that he was in a position to furnish the Subcommittee with information concerning Communist activity (R. 48–49, 98, 116). The first name of the person identified as "Shelton" was not given. Although this information came to the Subcommittee in a letter signed with a pseudonym, the identity of the writer was known to the former associate counsel of the Subcommittee, Robert Morris (R. 99–102, 190–191). The writer was considered to be reliable since other information he had given the Subcommittee had been checked and found to be correct (R. 101–102, 190).

Although the Subcommittee was still unaware of Mr. Shelton's first name, a subpoena was issued, addressed to "Willard Shelton" at the New York Times in New York City (R. 105). This name was a mistake since Willard Shelton was not the person actually sought by the Subcommittee (R. 49, 102). Counsel for the Subcommittee, Mr. Sourwine, later surmised, after an investigation by himself, that someone in the typing section of the Subcommittee staff confused the "Shelton" to be subpoenaed with one Willard Shelton, who is likewise a newspaperman but who was not employed by the Times or sought by the Subcommittee (R. 102–103).

The Subcommittee employee who went to New York City to serve the subpoena, along with other subpoenas, ascertained that no Willard Shelton was employed by the New York Times (R. 49, 106). He was told that a Robert Shelton (the petitioner) was an employee of that organization and he was the only "Shelton" on the editorial or news side (R. 49, 106). The Subcommittee employee added the words "or Robert Shelton" to the subpoena and upon instructions of the Subcommittee served the subpoena on petitioner (R 49, 105–106).

Between the time that the subpoena was issued and petitioner's appearance, the Subcommittee checked its various sources to secure further information concerning petitioner (R. 111). At that time, the Subcommittee had under the name Shelton (without a first name) three, four or five "leads" (R. 111). Because of this information, the Subcommittee desired to question petitioner concerning whether he was the Shelton who was not sufficiently identified by the Subcommittee's files (R. 111).

Petitioner, represented by counsel, first appeared at an executive session of the Subcommittee, in New York City on December 7, 1955 (R. 48). Petitioner was advised by Subcommittee counsel that the purpose of the appearance was to clarify the question of identity (R. 52). Upon being queried as to Communist Party membership, petitioner immediately responded that he had a statement to read (R. 52). The statement, which was then read, objected in substance to the Subcommittee's inquiry into petitioner's Communist

Party membership on the grounds that the Subcommittee lacked jurisdiction and the inquiry infringed his rights under the First Amendment of freedom of speech and, since he was a newspaperman, of the press (R. 53–55). Subcommittee counsel then told the Subcommittee that he was surprised by petitioner's refusal to answer the questions since petitioner was subpoenaed only for purposes of identification and he was not charged with being a Communist (R. 57).

The Subcommittee held public hearings in Washington, D.C., on January 4, 5, and 6, 1956 (R. 70–71). At the opening of the hearings on January 4, Senator Eastland, the chairman of the Subcommittee, announced that the hearings about to commence "stem from sessions of this subcommittee held on June 28 and 29, 1955, in which we heard the testimony of Mr. Winston Mansfield Burdett, a newspaperman and broadcaster" (R. 71). Burdett had, the chairman continued, disclosed the names of persons whom he knew as members of the Communist Party in the early 1940's. The chairman concluded that the investigation was of great importance because (R. 71):

> [A]mong the persons involved in this investigation have been many who were or are members of the press, and * * * the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration. * * * The present hearings open up a subsequent chapter to the Burdett testimony * * *.

Following the opening statement, another member of the Subcommittee, Senator Hennings, apparently apprehensive that the public might misconstrue the purpose of the hearings, further explained (R. 72–73):

> [T]his is not in any sense an attack upon the free press of the United States. * * *
>
> Of course, the committee is interested in the extent and nature of so-called Communist infiltration, if such exists, into any news-dispensing agency. * * * [T]his is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press.

In response, the chairman approved Senator Hennings' description of the purpose of the hearings as a "very fine and very accurate statement, one with which the Chair certainly agrees, in its entirety" (R. 73). The chairman went on to say (R. 73):

> We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it, and I think that when this series of hearings is over that no one can say that any newspaper or any employees of any one newspaper has been singled out.

Eighteen witnesses were called by the Subcommittee to testify at the hearings on January 4, 5, and 6, 1956. All had been or were then employed in mass commu-

nication. Clayton Knowles, who had previously given the Subcommittee information on Communist activity in newspapers (R. 75, 76), was among the witnesses called to testify on January 4. Knowles testified that he was then a reporter for the New York Times; that he was a member from 1937 to 1939 of the Communist Party unit of the Long Island Daily Press where he was a reporter; and that Party members at that time had positions of importance and exerted considerable influence in the American Newspaper Guild (Hearings, Part 17,[1] pp. 1635–1642).

On January 6, 1956 (two days later), immediately preceding petitioner's testimony, the hearings opened with the reading of a telegram sent to the Subcommittee by a New York newspaper, the Long Island Daily Press, in which that newspaper agreed with the Subcommittee's efforts to expose Communist infiltration wherever found (R. 74–75). The chairman, in responding to the telegram, repeated that the hearings were directed to investigating Communist infiltration into news agencies (R. 75–76). Senator Hennings stated (R. 77):

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication.

The Subcommittee then called petitioner to testify. At petitioner's trial, Counsel Sourwine stated that

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[1] Part 17 of the Hearings is entitled *Strategy and Tactics of World Communism (Communist Activity in New York)*.

the reason petitioner was recalled by the Subcommittee was that he had refused to answer certain questions at the executive session (R. 81):

> They were questions in the area in which the committee wanted information. I was satisfied that he had such information, and I hoped that if he came on in executive session [sic], that perhaps he might change his mind and give it to us.

Mr. Sourwine further testified that "the question under inquiry before the subcommittee when the defendant testified" was (R. 138–139):

> Broadly, the question under inquiry was the scope and extent and activities of the communist conspiracy against the United States, more specifically, as it applied to the New York area, and on the particular day he testified, and with regard to his testimony, still more specifically within that broader area, and we endeavored to get information about communist activity in the New York Times or in connection with employees of the New York Times or by such employees.

Mr. Sourwine continued (R. 139):

> When the committee was questioning this particular witness, within the area of its much broader investigation, it was concerned with the particular area of that broader investigation which concerned communist activity among newspaper people, communist activity on the New York Times and communist activity in an effort to infiltrate the Typographical Union in New York.

At the start of his testimony before the Subcommittee on January 6, before he was sworn, petitioner interposed several objections to his having been called to testify. These objections included: an objection to the jurisdiction of the Subcommittee on the ground that petitioner's testimony in executive session made clear that no information would be obtained relating to the Subcommittee's legislative purpose; the claim that questioning "might subject me to prosecution in violation of my right to be tried in the community where I work and live"; and the statement that he did not "see why I am involved in this hearing, which the chairman said on Wednesday stems from the Burdett testimony. There was no reference to me in the Burdett testimony nor in the testimony of Clayton Knowles" (R. 84).

After having been sworn, petitioner gave his name and stated that he had been employed first as a news clerk and then as a copy editor on the New York Times for the previous five years (R. 84–85). Petitioner was then asked: "Are you, sir, a member of the Communist Party, U.S.A.?" (R. 86). After consultation with his counsel, petitioner said that "I decline to answer on the grounds of the first amendment and challenge to the jurisdiction of the committee" (R. 87). He was then permitted to read a lengthy statement in which he restated his refusal to answer the question on the basis of the First Amendment and the lack of jurisdiction of the Subcommittee to investigate beliefs and associations (R. 87–91). These objections were predicated principally

on the claim that the Subcommittee was investigating newspapers, which violated freedom of the press. The objections were overruled by the chairman, who ordered him to answer the question (R. 91). Petitioner persisted in his refusal to answer the question on the grounds set forth in his statement (R. 91), and Count 1 of the indictment was predicated upon this refusal (R. 2).

Later in the hearing, petitioner refused to answer, on the basis of the two grounds given in his written statement, whether he was acquainted with any persons whom he knew to be members of the Communist Party, whether he had ever attended Party meetings, and whether he knew Matilda Landsman. As disclosed at the trial, Matilda Landsman was believed by the Subcommittee to be an employee of the New York Times at the same time petitioner was on the Times, first as a secretary and, after resigning to take linotype training, as a journeyman linotype operator in the typographical department; a member of Typographical Union No. 6; and a member of the Communist Party who had participated in the Party's attempt to take over the Typographical Union (R. 61–62). Petitioner denied having "any knowledge respecting a Communist attempt to take over control of Typographical Union No. 6" or having "discuss[ed] with Matilda Landsman the question of any Communist activity in that union" (R. 93). Following these denials, he was then asked (R. 93):

> Now, for the purpose of testing the credibility of that answer, sir, I will ask you, did you ever have any conversation with Matilda Landsman?

Petitioner refused to answer this question on the grounds set forth in his prepared statement. The chairman ordered petitioner to answer the question on penalty of contempt of the Senate, but petitioner persisted in his refusal based on these same grounds (R. 94). Count 2 of the indictment was predicated upon this refusal (R. 2).

SUMMARY OF ARGUMENT

I

Petitioner cannot excuse his refusal to answer by the alleged lack of pertinency of the questions.

A. A series of decisions by this Court has established that a witness charged with contempt cannot raise at his trial issues which he did not raise before the tribunal before which the contempt occurred—at least when the tribunal might have been able to meet the witness' objection. *E.g., Hale* v. *Henkel,* 201 U.S. 43; *United States* v. *Bryan,* 339 U.S. 323. A Congressional committee can remedy an alleged failure to make the pertinency of the question clear to the witness by fully explaining its pertinency or even by modifying the precise subject under inquiry, if necessary. Thus, this Court has held that a witness before a Congressional committee cannot claim that the committee failed to apprise him adequately of the pertinency of the question unless he makes a specific objection on this ground before the committee. *Barenblatt* v. *United States,* 360 U.S. 109, 123–124; *Deutch* v. *United States,* 367 U.S. 456, 469.

Petitioner did not make even the "contemplated" and "buried" objection to the questions on the ground of lack of pertinency which was made by the witness in *Barenblatt* nor did he indicate any doubt as to the importance of the questions such as was stated by the witness in *Deutch*. He said that he could not understand why he had been subpoenaed, but this objection appears only to raise the issue of "probable cause," a contention which petitioner renews in this Court. Moreover, this general objection was made when petitioner first appeared before the Subcommittee, before any questions were asked; it was not, and could not have been, directed to questions which petitioner did not even know would be asked. When they were asked petitioner gave other, different, grounds for refusing to answer. He never claimed lack of understanding of the pertinency of the questions, and is therefore in no position to raise that issue now.

B. In any event, petitioner was made fully aware of the subject under inquiry. At the beginning of the hearings, the chairman clearly stated that the Subcommittee's purpose was to investigate Communist activity in news media. While petitioner did not appear before the Subcommittee until two days later, he showed his awareness of the contents of the chairman's opening statements as well as of the testimony of two other witnesses before the Subcommittee concerning Communist infiltration of communications. Moreover, petitioner was presumably in the committee room when, only a few minutes before he appeared, two

members of the Subcommittee clearly identified the subject of the investigation as Communist infiltration of newspapers and other methods of communication. And almost all of petitioner's statement giving his reasons for refusing to answer the Subcommittee's questions is devoted to the claim that investigation of the newspaper field violated freedom of the press.

Petitioner claims that four different subjects under inquiry have been stated by the government at various stages of this case. All these statements mentioning other subjects are fully consistent with the assertion that the subject of investigation was Communist activities in news media. For example, this subject is part of the larger subject of Communist activity in the United States generally, while Communist activity on the New York Times is part of Communist activity in news media.

Petitioner also claims that the government gave an oral bill of particulars restricting its proof of the subject under inquiry to Communist activities generally. But the Assistant United States Attorney made clear that he was merely saying that the authority of the Subcommittee included Communism generally—which obviously includes the more particularized subject of Communist activity in news media. Even if there was a variance between the government's proof and the bill of particulars, it is well established that the government can amend its bill of particulars as long as the defense is protected against surprise. If petitioner is correct in his interpretation of the oral bill of particulars, the govern-

ment in effect amended it later. And petitioner has never claimed—and could not claim—that he was surprised by the government's reliance on the Subcommittee's clear statements made at the hearing as to the subject under inquiry.

II

Petitioner's claim that the Subcommittee violated the Fourth Amendment is without merit.

A. Petitioner did not raise this objection before the Subcommittee. Merely to express doubt of the sufficiency of the reasons for calling him was not specific enough to meet the requirement of *Barenblatt* and *Deutch* that objections be brought home to the committee. Thus, this contention was not available when he was tried for contempt.

B. In any event, the Fourth Amendment pertains only to subpoenas *duces tecum*, not to subpoenas to testify. The language of the Amendment itself makes clear that it was intended to protect "persons, houses, papers, and effects" only from improper search or seizure. And this Court has never applied the amendment to subpoenas to testify. While in *Barenblatt, supra, Braden* v. *United States*, 365 U.S. 431, and *Wilkinson* v. *United States*, 365 U.S. 399, the Court indicated that a Congressional committee can subpoena a witness only on the basis of probable cause, it suggested that this requirement resulted from the First Amendment or from the need for a valid legislative purpose; the Fourth Amendment was not even mentioned.

C. Even if the Fourth Amendment can be invoked, it was not violated in this case. In *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209, which involved an administrative subpoena *duces tecum*, this Court held that the requirement of probable cause under the Fourth Amendment is satisfied if "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." There is no reason to apply a stricter standard to subpoenas to testify than to subpoenas *duces tecum*, or to Congressional committees than to executive agencies. Here, the investigation was authorized by Congress, and had a purpose Congress could order; the questions petitioner was asked were pertinent to the subject under inquiry; and the Subcommittee had a reasonable basis for believing that the petitioner had information which would be of value in the investigation.

III

The Subcommittee's investigation of Communist infiltration of news media did not violate the First Amendment.

A. The record of the hearings and trial shows that the Subcommittee was investigating Communist infiltration of news media, not the news media in themselves. In the *Barenblatt*, *Braden*, and *Wilkinson* cases, this Court established that Congressional committees could, consistent with the First Amendment, investigate Communist activities in education and propaganda; equally, Congress can investigate Communist activities in news media.

B. The Subcommittee's subpoenaing of petitioner was not the result of "indiscriminate dragnet procedures, lacking in probable cause." *Barenblatt* v. *United States, supra,* 360 U.S. at 134. The standard laid down in *Barenblatt*, *Braden*, and *Wilkinson* under the First Amendment is plainly less strict than that applied to arrests or searches and seizures under the Fourth Amendment. Moreover, there is no reason under the First Amendment to apply a stricter standard for subpoenas to testify than the Court applied under the Fourth Amendment in the *Oklahoma Press* case, *supra,* to subpoenas *duces tecum.* In short, the proper standard to be applied when a Congressional committee subpoenas a witness is whether it has a reasonable basis for believing that the witness has information related to the subject under investigation which would be of value to the committee.

Applying this standard, it is clear that the Subcommittee had probable cause to subpoena petitioner. It had heard testimony as to Communist efforts to infiltrate the newspaper field. A reliable informant had written the Subcommittee that a Shelton on the news side of the New York Times was an active Party member in a Communist group on the Times and would be able to give the Subcommittee information as to that group. While the Subcommittee did not have the first name of Shelton and initially made an error in this regard in making out the subpoena, there was only one Shelton on the news side of the Times. Thus, the Subcommittee could be reasonably

certain that the Shelton who was subpoenaed was the man identified as a Party member. But even if, *arguendo,* the Subcommittee did not have reasonable ground to believe that petitioner was a Party member, the Subcommittee was absolutely certain that petitioner had valuable information. For he could at least clarify for the Subcommittee whether he was the Shelton identified by the informant and by other information possessed by the Subcommittee.

IV

Petitioner cannot challenge the grand jury for bias on the ground that it was composed in part of government employees.

A. An indictment is not automatically invalid merely because government employees are grand jurors. Indeed, it is well established that federal employes are not automatically disqualified from serving even on petit juries in federal criminal cases. And this rule has been applied to a case involving a prominent Communist charged with contempt of the House Un-American Activities Committee. *Dennis* v. *United States,* 339 U.S. 162. These principles involving the petit jury apply *a fortiori* to grand juries, since defendants have been traditionally provided far more protection from possible bias as to jurors on petit juries.

B. Petitioner was not entitled to a hearing in order to show that the grand jurors were biased because he failed to allege specific and convincing facts demonstrating the bias of individual grand jurors.

The courts are traditionally reluctant to scrutinize grand jury proceedings. See *Costello* v. *United States*, 350 U.S. 359. The reasons are that an indictment is merely an accusation and does not decide guilt or innocence; thorough scrutiny of grand jury proceedings would mean considerable delay in the administration of criminal justice; and the defendant is guaranteed elaborate trial and appellate protection as to the proceeding at which his guilt or innocence is determined. Moreover, this general reluctance to scrutinize grand jury proceedings is particularly strong with regard to inquiries into the beliefs and prejudices of grand jurors. History shows that grand juries, unlike petit juries, are not expected to be unprejudiced. Rather, they serve as conduits to report the common knowledge of the community to the courts.

This Court has never said what kind of bias, if any, would disqualify a grand juror or what kind of allegations are necessary to require a hearing on this issue. The cases invalidating convictions because of racial or other discrimination on grand juries turn, not on the bias of the grand jurors who were on the improperly constituted grand jury, but on the failure of the grand jury fairly to represent the community. Most other courts which have considered the issue of grand-jury bias have held that bias, no matter how strong, of one or more grand jurors does not invalidate an indictment. But some courts have held that an indictment is invalid if it is shown that individual grand jurors are strongly biased. At the

least, the rule in federal courts must be to require convincing proof of strong bias in individual grand jurors. For in *Dennis* v. *United States, supra,* the plurality opinion stated that even petit jurors are not disqualified unless "actual bias" is shown as to individual jurors; it is not enough to show that government employees generally are impliedly biased as a result of government loyalty and security programs.

Even if we apply the standard in *Dennis,* petitioner did not allege the specific and convincing facts as to individual grand jurors necessary to entitle him to a hearing. Petitioner alleged only that government employees in general were biased and intimidated by the government loyalty and security programs. Moreover, he did not even allege specific facts indicating generally that government employees were biased or intimidated. Thus, petitioner is in effect seeking a hearing in order to conduct a general exploration into the motives and beliefs of some [redacted] grand jurors.

V

The indictment was not required to specify the subject under inquiry. It is well established that indictments in the statutory language are ordinarily sufficient. This principle has been applied by this Court so as to sanction the omission of a specific allegation of materiality in a perjury indictment (*Markham* v. *United States,* 160 U.S. 319, 325), which is closely analogous to the pertinency of questions in a case involving contempt of Congress. Every decision in the courts of appeals has held that

an indictment under 2 U.S.C. 192 need not specifically state the subject under inquiry.

Here the indictment stated, in the words of the statute, that the questions petitioner refused to answer were "pertinent to the question then under inquiry." The indictment provided ample information to prevent a second prosecution for the same offense—the name of the committee, the date of the hearings, and the specific questions which petitioner refused to answer. With respect to preparing his defense, petitioner was clearly apprised at the time of the hearings what the subject under inquiry was, and he could hardly have been in doubt that the transcript of the hearings would be relied on by the government at his trial.

ARGUMENT

I

PETITIONER, HAVING FAILED TO CHALLENGE THE PERTINENCY OF THE QUESTIONS BEFORE THE SUBCOMMITTEE, CANNOT RAISE THE ISSUE FOR THE FIRST TIME AT HIS TRIAL. IN ANY EVENT, PETITIONER WAS APPRISED OF THE SUBJECT UNDER INQUIRY

In *Deutch* v. *United States*, 367 U.S. 456, this Court stated that "two basically different issues" of pertinency are involved in a prosecution for contempt of Congress. One issue arises out of "the prosecution's duty at the trial to prove that the questions propounded by the congressional committee were in fact 'pertinent to the question under inquiry' by the committee." *Id.* at 468. The Court held, in reversing the *Deutch* conviction on that ground,

that pertinency is part of the standard of criminality for contempt of Congress and therefore must be proved by the government even if not challenged at the committee hearing.

Petitioner, however, did not raise this issue in the court of appeals or in his petition for certiorari (see Pet. 2). While petitioner now claims that there was no question under inquiry before the Subcommittee (Pet. Br. 2, 26, 58), this was not the issue on which certiorari was granted and therefore it is not before the Court. Consequently, we do not consider this issue at length in this brief, but merely note here that the actual relevancy of the questions petitioner refused to answer to the subject under inquiry is clear beyond doubt. The subject under inquiry was, as the trial court found (R. 225), Communist infiltration into news media. This subject was shown by the statements of members of the Subcommittee and the testimony of other witnesses before the Subcommittee which were known to petitioner and which, as we will show (pp. 32–33), fully apprised petitioner of the subject the Subcommittee was pursuing. In addition, all the witnesses called by the Committee to testify at the hearings on January 4, 5, and 6 worked in the news media field (see Gov. Ex. 7) and the Subcommittee counsel testified at petitioner's trial that Communist activity in this area was the subject under inquiry (see *supra*, p. 10). The question whether petitioner, who was employed by the New York Times (see *supra*, p. 11), was a member of the

Communist Party (Count 1) is obviously pertinent to the subject of Communist infiltration of the press. Cf. *Wilkinson* v. *United States,* 365 U.S. 399, 413; *Barenblatt* v. *United States,* 360 U.S. 109, 125. As to the question whether petitioner had ever had a conversation with Matilda Landsman (Count 2), the Subcommittee had information that she was an employee of the New York Times and was a member of Typographical Union No. 6 and of the Communist Party (see *supra,* p. 12). The question, as petitioner was told at the hearings, was intended to test the credibility of his earlier answers denying any knowledge of a Communist attempt to take control of Typographical Union No. 6 and denying having discussed Communist activity in the union with Matilda Landsman. Thus, the pertinency of this question to the subject under inquiry is likewise clear.

The other issue as to pertinency noted by the Court in *Deutch* is whether "the pertinency of the interrogation to the topic under the congressional committee's inquiry [was] brought home to the witness at the time the questions [were] put to him" (367 U.S. at 467–468). The Court made clear that any witness who is doubtful about the pertinency of questions must raise the issue before the Congressional committee. He cannot object that the pertinency was not explained to him for the first time at the trial for contempt. As we will show below (pp. 25–32), petitioner did not challenge the pertinency of the questions before the Subcommittee at the hearings, and therefore the Subcommittee had no duty

to apprise petitioner of the subject under inquiry. We will also show (pp. 32–41), however, that petitioner was in fact apprised of the subject under inquiry.

A. THE ISSUE OF PERTINENCY WAS NOT PROPERLY RAISED BEFORE THE SUBCOMMITTEE

Petitioner claims that he was not adequately apprised by the Subcommittee of the subject under inquiry so that he could determine whether the questions asked him were pertinent to this subject. But petitioner failed to raise this objection before the Subcommittee and, under this Court's decisions, is precluded from raising it for the first time in the contempt proceeding.

1. In *Hale* v. *Henkel,* 201 U.S. 43, the witness based his refusal to produce documents on three grounds, one of which was that it was "impossible for him to collect them within the time allowed" (*id.* at 70). The Court indicated that it would not consider this objection because, "[h]ad the witness relied solely upon [this] ground, doubtless the court would have given him the necessary time" (*ibid.*). *United States* v. *Bryan,* 339 U.S. 323, 334, in commenting on the *Hale* case, stated:

> [H]aving refused compliance for other reasons which the lower court could not remedy, the witness could not later complain of its refusal to do a meaningless act—to grant him additional time to gather papers which he had indicated he would not produce in any event.

Similarly, *Bryan* held that a witness who, having been subpoenaed to appear and produce records be-

fore a Congressional committee, appears but refuses to produce the records, may not raise at his trial for the first time the issue whether a quorum of the committee was present. The Court stated that "[t]he defect in composition of the Committee, if any, was one which could easily have been remedied. * * * For two years, now grown to four, the Committee's investigation was obstructed by an objection which, so far as we are informed, could have been rectified in a few minutes" (339 U.S. at 333). Moreover, it was apparent that this witness "would not have complied with the subpoenas no matter how the Committee had been constituted at the time. * * * Here respondent would have the Committee go through the empty formality of summoning a quorum of its members to gather in solemn conclave to hear her refuse to honor its demands" (*id.* at 333–334). And in *United States* v. *Fleischman*, 339 U.S. 349, 352, the Court, relying on *Bryan*, stated simply that the issue of a quorum "was raised for the first time at the trial, two years after [the witness'] appearance before the Committee, where she had given other reasons for her failure to produce the documents," and therefore "the defense of lack of quorum was not available to her."

The principles originally laid down by the Court in the *Hale*, *Bryan*, and *Fleischman* cases are fully applicable to the issue whether the witness is sufficiently apprised of the subject under inquiry and the pertinency of the questions to this subject. When a witness challenges the pertinency of a question, the Congressional committee or its counsel can explain

more fully the subject under inquiry and the relationship between the question and the subject. Indeed, the committee can even modify the precise subject under inquiry if that is necessary. Moreover, when a witness relies on other grounds for refusing to answer the question, the pertinency of the question, like the existence of a quorum, is immaterial since the witness would not have answered no matter how clear the committee made the pertinency of the question appear.

In *Watkins* v. *United States*, 354 U.S. 178, the Court stated that "[t]he final source of evidence as to the 'question under inquiry' is the Chairman's response *when petitioner objected to the questions on the grounds of lack of pertinency*" (*id.* at 214; emphasis added). The Court then held that, "[u]nless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, *upon objection of the witness on grounds of pertinency*, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto" (*id.* at 214–215; emphasis added).[2] The footnote to this sentence reads "Cf. *United States* v. *Kamin*, 136 F. Supp. 791, 800" (354 U.S. at 215, note 55). At page 800 of the *Kamin* opinion, then District Judge Ald-

[2] Watkins specifically told the committee that "I do not believe that such questions are relevant to the work of this committee * * *."

rich emphasized the necessity of a specific objection on grounds of pertinency:

> The defendant contends that it is not enough for a question to be pertinent—the witness must be informed of the subject matter, so that he may have a definite standard by which to determine whether he should answer. Because if he was not so informed he admittedly indicated no interest, and did not choose to supplement any deficiency in his knowledge by asking either the Chairman or his own counsel, I regard this contention as immaterial.

The requirement that the issue of pertinency be raised before the investigating committee was made absolutely clear by the holding in *Barenblatt* v. *United States, supra,* 360 U.S. at 123–124. Indeed, the Court stated that the issue is not even raised by a memorandum submitted by a witness to the committee saying that "I might wish to * * * challenge the pertinency of the question to the investigation" and quoting, from an opinion of this Court, "language relating to a witness' right to be informed of the pertinency of questions asked him by an administrative agency." *Id.* at 123. This Court held that "[t]hese statements cannot, however, be accepted as the equivalent of a pertinency objection. At best, they constituted but a contemplated objection to questions still unasked, and buried as they were in the context of petitioner's general challenge to the power of the Subcommittee they can hardly be considered adequate, within the meaning of what was said in *Watkins* * * * to trigger what would have been the Sub-

committee's reciprocal obligation had it been faced with a pertinency objection" (*id.* at 123–124). See also *McPhaul* v. *United States,* 364 U.S. 372, 380–381. And in *Deutch* v. *United States,* 367 U.S. 456, 468, the Court found that "the petitioner was not made aware at the time he was questioned of the question then under inquiry nor of how the questions which were asked related to such a subject." Nevertheless, the Court did not reverse the witness' conviction on this ground since (*id.* at 469):

> [T]he thoughts which the petitioner voiced in refusing to answer the questions about other people can hardly be considered as the equivalent of an objection upon the grounds of pertinency. Although he did indicate doubt as to the importance of the questions, the petitioner's main concern was clearly his own conscientious unwillingness to act as an informer. It can hardly be considered, therefore, that the objections which the petitioner made at the time were "adequate, within the meaning of what was said in *Watkins, supra,* at 214–215, to trigger what would have been the Subcommittee's reciprocal obligation had it been faced with a pertinency objection." *Barenblatt, supra,* at 124.

2. Petitioner in the instant case, who appeared before the Subcommittee with counsel, did not make even the "contemplated" and "buried" objection to the two questions on the ground of pertinency which was made by the witness in *Barenblatt* or indicate any doubt as to the importance of these questions such as was stated by the witness in *Deutch.* In-

stead, petitioner orally stated, after consulting with his counsel, that he objected to the question whether he was a Party member (Count 1) on the grounds of the First Amendment and the Subcommittee's lack of jurisdiction (see *supra*, pp. 11–12). The lengthy legal document which he read to the Subcommittee after being asked this question and which he also invoked after being asked whether he had talked with Matilda Landsman (Count 2) raises, and develops, only these same two grounds concerning the Subcommittee's power to investigate beliefs and associations. It does not even suggest that petitioner was refusing to answer the questions because of their lack of pertinency. And petitioner explictly told the Subcommittee that this written statement, which was obviously prepared by counsel, contained the only grounds he was raising (R. 90).

The only statement made by petitioner at the hearings which could conceivably be construed to have raised the issue of pertinency came at the start of his appearance before the Subcommittee. He then gave as one of his three objections to being called by the Subcommittee (see *supra*, p. 11) that "[I fail to] see why I am involved in this hearing" since no prior witnesses had mentioned him. This objection, however, seems to claim that the Subcommittee did not have probable cause to subpoena him—a contention which petitioner renews in this Court (Pet. Br. 29–53; see *infra*, pp. 41–48, 50–62)—not that the questions asked petitioner lacked pertinency to the subject under inquiry. At the least, this objection does not have the clarity required by this Court in *Barenblatt* and

Deutch (where the witness "indicate[d] doubt as to the importance of the questions" (367 U.S. at 469)) "to trigger what would have been the Subcommittee's reciprocal obligation had it been faced with a pertinency objection." *Barenblatt* v. *United States, supra*, 360 U.S. at 124. Moreover, petitioner made this general objection prior to his being sworn and before any questions had been asked. The objection was not, and could not, have been directed to questions which petitioner did not even know would be asked. When the questions on which Counts 1 and 2 are based were asked, petitioner gave other, different grounds for refusing to answer them.

Petitioner's omission of any objection as to the pertinency of the two questions which were the basis of his conviction is particularly significant since, in response to other questions asked by the Subcommittee—both before and after the two questions which underlie Counts 1 and 2—he specifically objected on the ground of pertinency. Three times in testifying before the Subcommittee in executive session (R. 52, 59, 63) and three times in open session (R. 85, 86, 94) petitioner stated explicitly that he objected to a question because it was not pertinent. For example, in executive session he twice responded, "Is that question pertinent to the scope of this inquiry?" (R. 52, 59). At the hearing during which his contumacy occurred, he stated with respect to other questions: "I don't see the pertinency of the question to the scope of the investigation" (R. 85); "I am raising the question since this is not a question of the investigation of the press, why you are asking why I have written—" (R. 86); "I really must challenge the pertinency of that

question to the scope of the investigations" (R. 94). Thus, petitioner knew how to object to the pertinency of particular questions but, apparently because he understood the pertinency of these two particular questions, deliberately did not raise this objection as to them.

B. PETITIONER WAS APPRISED OF THE SUBJECT UNDER INQUIRY

1. There can be little doubt that petitioner was aware of the subject under inquiry. At the beginning of the hearings on January 4, 1956, the chairman clearly stated that the purpose of the hearings was to investigate Communist activity in the news media field (see *supra*, p. 7). While petitioner did not appear at the hearings until January 6, he showed his awareness of the chairman's opening statement by saying at the hearings that he did not "see why I am involved in this hearing, which the chairman said on Wednesday stems from the Burdett testimony" (see *supra*, p. 11). Petitioner also showed that he was familiar with the testimony of Winston Burdett and Clayton Knowles—which concerned Communist infiltration of the communications field (see *supra*, pp. 4, 9)— by saying that "[t]here was no reference to me in the Burdett testimony nor in the testimony of Clayton Knowles."

Moreover, petitioner was presumably in the room at the beginning of the Subcommittee's proceedings on January 6, 1957, the day he was subpoenaed to appear, and did appear only a few moments later as the first witness of the day. Before petitioner

testified on January 6, the chairman stated that the hearings were directed to investigating infiltration of persons identified as Communists into news agencies. Senator Hennings said (R. 77):

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication.

And petitioner's prepared statement which was read by him before the Subcommittee as his reason for refusing to answer the questions underlying his conviction demonstrates clearly that he knew that the Subcommittee's investigation was into Communist activity in the newspaper field. For almost the entire statement is devoted to the claim that the Subcommittee's investigation of the newspaper field violated freedom of the press guaranteed by the First Amendment (R. 88–89, 90–91).

2. Petitioner contends (Pet. Br. 17–21, 58–60, 67) that the subject under inquiry could not possibly have been made clear to him since different subjects were stated by the Subcommittee at the hearings, by the prosecution and Subcommittee counsel at the trial, and by the district court and court of appeals. Petitioner contends (Pet. Br. 18) that four different subjects have been suggested: (1) Communism generally; (2) Communist infiltration of news media; (3) Communism in the New York Typographical Union or in the New York area; and (4) Communism on the

New York Times. This contention is clearly without merit.

All these subjects except possibly Communism in the New York area are on their face fully and directly consistent with subject number 2, Communist infiltration of news media, which, as we have shown (pp. 32–33), was the subject clearly described to petitioner at the hearing. That subject was obviously a part of Communism in the United States generally, which is the major part of the investigatory authority given the Subcommittee by the Senate. S. Res. 366, 81st Cong., 2d Sess. On the other hand, Communism in the New York Typographical Union and on the New York Times are a part of the subject of Communism in news media. Thus, all these subjects were being investigated at one and the same time. And the pertinency of the questions which petitioner refused to answer was equally apparent to all these subjects.

As to the subject of Communism in New York, this too was the subject under inquiry. For, while the subject was Communist infiltration of news media, the hearing was in fact limited to such Communist activity in the New York area. This can be readily seen from the witnesses who testified. Thus, the Subcommittee, while investigating Communism in news media, was also investigating Communism in New York. Moreover, the only references to this subject as the subject under inquiry were the heading to the transcript of the hearings (Gov. Ex. 7) and testimony of Subcommittee counsel at petitioner's trial (R. 138–139). Thus, even if we assume *arguendo* that petitioner would have been confused if he had

been told when he testified that the Subcommittee was investigating both Communism in news media and in New York, petitioner was not so told.[3]

Indeed, as petitioner implicitly admits (Pet. Br. 18–19), the *only* subject described to petitioner at the hearings was Communist infiltration of news media. Both the district court and the court of appeals held that this was the subject under inquiry (R. 224, 225, 243). We submit that the description of other subjects under inquiry long after the time petitioner refused to answer the questions (particularly when these subjects are fully consistent with the subject which was clearly described to him) cannot possibly mean that the Subcommittee did not apprise petitioner of the subject under inquiry.

2. Petitioner argues (Pet. Br. 60–63) that the oral bill of particulars furnished prior to trial makes the subject under inquiry that stated in the resolution authorizing the Internal Security Subcommittee, *i.e.*, Communist activities generally, and that this Court held in *Watkins* v. *United States*, *supra*, that this resolution is not sufficiently precise to apprise a witness of the subject under inquiry. Thus, petitioner argues, the government cannot rely on evidence showing that petitioner was apprised that the subject under inquiry was the lesser, more specific inquiry of Communist infiltration in the news media field.

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[3] In addition, little importance can be attached to the headings subsequently placed on particular hearings. As the chief counsel of the Subcommittee testified in *Liveright* v. *United States*, No. 11, this Term, the headings are applied merely "to keep the evidence in a reasonably dispensable channel" (J.A. 119–120).

At a hearing on defendant's pre-trial motions, government counsel gave an oral bill of particulars in response to an oral motion, in which he stated, regarding the subject under inquiry, that the inquiry was being conducted pursuant to the Senate resolution authorizing the Subcommittee and for the purposes contained in that resolution (R. 19–20). The resolution authorized investigation of Communist activities generally. Considering the oral bill of particulars in context, it is apparent that this reply by the Assistant United States Attorney was not intended to preclude the government from introducing evidence that the subject under inquiry was the more specific subject of Communist infiltration of the press. The latter subject is merely one portion of the broader subject of Communist activities in general, which the resolution authorizes the Subcommittee to investigate. When the Subcommittee is investigating the narrower problem of Communist infiltration of the press, it is simultaneously investigating the broader subject which it is authorized to investigate. The introduction of evidence on the narrower problem was therefore consistent with the statement of the Assistant United States Attorney that the subject under investigation was the full scope of the Subcommittee's authority.

While the Assistant United States Attorney did state that there was no "smaller, more limited inquiry being conducted" (R. 20), he apparently meant that the Subcommittee was not *restricted* to showing any inquiry less than the full authorizing resolution. In fact, he specifically said that his remarks as to the

exact subject under inquiry should not be taken to limit the scope of the government's proof at the subsequent trial (R. 17):

> That [the subject under inquiry] is a matter of fact that will come out at the trial and the proof. [Petitioner] is not entitled to have it in advance because the authority that this subcommittee was acting under is found in the resolution which I have already referred to, and there is no particularly defined inquiry less than the full authority to which this committee was restricted at this particular hearing.

Again indicating that he was not limiting the Subcommittee's general power to investigate Communism wherever found, the Assistant United States Attorney stated (R. 17):

> Let us assume that the particular inquiry at the moment might have been subversive activities in the field of education. That does not limit and does not restrict the full authority that was granted to this committee by the resolution and, therefore, the committee, through this subcommittee, could make all inquiries that were authorized by it to make.

From these statements it is apparent that the government was not denying that the Subcommittee was conducting a particularized inquiry. While resisting a specification of the subject under inquiry because the indictment was "sufficient, without further particularization, to inform the defendant of the charge that he must meet and to protect him from a second prosecution" (R. 18), the Assistant United States Attorney was at the same time insisting that the Sub-

committee was entitled to pursue the full extent of the powers provided by the Senate. Thus, his statement at the trial did not preclude the government from introducing evidence that the more specific subject under inquiry when petitioner was questioned was Communist infiltration of the press.

Even if we assume, *arguendo*, that the Assistant United States Attorney intended to restrict the government's proof of the subject under inquiry to Communist activities in general, this still did not preclude the government from offering evidence at the trial that the particular subject under inquiry at petitioner's hearing was Communist activities in the area of the press. While a variance between an indictment and the proof introduced is fatal if it relates to a matter of substance (see *Stirone* v. *United States*, 361 U.S. 212), the variance between a bill of particulars and the proof is fatal only if the defendant has been prejudiced. *United States* v. *Albanese*, 224 F. 2d 879 (C.A. 2); *United States* v. *Costello*, 221 F. 2d 668, 675 (C.A. 2), affirmed, 350 U.S. 359; *Neal* v. *United States*, 185 F. 2d 441 (C.A. D.C.), certiorari denied, 340 U.S. 937; *Shayne* v. *United States*, 255 F. 2d 739, 743–744 (C.A. 9), certiorari denied, 358 U.S. 823; *McKenna* v. *United States*, 232 F. 2d 431, 436–437 (C.A. 8).

This difference between the cases where the variance involves an indictment or a bill of particulars reflects their significantly different functions. The Fifth Amendment guarantees that a person charged with a felony be indicted by a grand jury and that the in-

dictment contain the essential elements of the crime. If the government offers proof at trial inconsistent with one of the essential elements charged, it cannot be assumed that the grand jury would have been willing to return an indictment with a charge conforming to the proof actually introduced. Thus, in such circumstances the government is in effect attempting to convict the defendant of a crime for which he was not indicted. See *Stirone* v. *United States, supra,* 361 U.S. at 217.

On the other hand, a bill of particulars is simply designed to give the defendant sufficient details of the charges against him so that he can adequately prepare his defense and not be surprised by the evidence offered by the prosecution. *Dunlop* v. *United States,* 165 U.S. 486, 490–491; *Braden* v. *United States,* 272 F. 2d 653, 662 (C.A. 5), affirmed, 365 U.S. 431; *McMullen* v. *United States,* 96 F. 2d 574, 579 (C.A. D.C.). Since the prosecution and not a quasi-judicial body like the grand jury provides the bill of particulars, the government is entitled to amend its bill of particulars at any time so long as the defense is not surprised or otherwise prejudiced by the amendment and subsequent variance between the government's proof and the original bill. Rule 7(f), Federal Rules of Criminal Procedure; *United States* v. *Bender,* 218 F. 2d 869, 874 (C.A. 7). Although the government in this case did not go through the technicality of amending the bill of particulars, if the government's proof was inconsistent with the bill, "the effect of what it did was the same" (*Stirone* v.

United States, supra, 361 U.S. at 217); thus, just as if the bill of particulars had been formally amended, there can be no complaint unless the variance between the government's proof and the bill surprised the defendant and thereby unfairly prejudiced his defense.

Petitioner does not claim, and has never claimed, that his defense was surprised or otherwise prejudiced by any variance between the government's oral bill of particulars and the proof it offered at the trial. If petitioner was prejudiced, this fact was of course apparent to him when the government introduced the evidence which he claims conflicts with the bill of particulars. And if this objection had been properly raised at the trial, any prejudice could have been cured by granting petitioner a continuance so that he could prepare his defense to the government's evidence. See *United States* v. *Neff,* 212 F. 2d 297 (C.A. 3).

In any event, the record demonstrates that petitioner was not prejudiced by the alleged variance between the government's bill of particulars and its proof of the subject under inquiry. Petitioner clearly came to trial adequately prepared to rebut the government's evidence that the Subcommittee was considering Communist infiltration in the news media field, for this was the Subcommittee's sole interest at both the executive and public sessions at which petitioner testified. The transcripts of both these hearings were of course public documents which were readily available to petitioner and his counsel. In

addition, during both of petitioner's appearances before the Subcommittee he objected to the investigation of Communist activity as infringing on freedom of the press (see *supra*, pp. 6–7, 11–12). And, at the trial, petitioner's counsel had charts respecting the newspaper affiliations of the other witnesses called by the Subcommittee at the public hearings at which petitioner testified (R. 148–149).

In short, it is plain that petitioner knew long before his trial that the government would attempt to prove that the specific subject under inquiry by the Subcommittee was Communist activity in the communications field. His failure to object on the ground of surprise when the government introduced this evidence undoubtedly reflects his belief that there was no variance between the proof and the bill of particulars, or his agreement that the variance in no way surprised or prejudiced him.

II

THE SUBPOENAING OF PETITIONER TO TESTIFY BEFORE THE SUBCOMMITTEE DID NOT VIOLATE THE FOURTH AMENDMENT

A. PETITIONER CANNOT RAISE THIS OBJECTION FOR THE FIRST TIME AT HIS TRIAL

Petitioner urges (Pet. Br. 29–53) that the subpoena issued to him violated his rights under the Fourth Amendment because the Subcommittee did not have probable cause to believe that he possessed information relevant to the pending inquiry.

We have seen, however, that this Court has repeatedly held that a witness who refuses to produce

documents or testify before a Congressional committee must present his legal objections before the committee (see *supra*, pp. 25–29). If he fails to do so, it is established that objections cannot be raised for the first time at his trial for contempt. This principle has been applied by this Court to constitutional claims in a case where a witness refused to answer questions propounded by a grand jury. In *Ullmann* v. *United States*, 350 U.S. 422, 439, note 15, the Court refused to consider First Amendment issues on the ground that "it is every man's duty to give testimony before a duly constituted tribunal unless he invokes some valid legal exemption in withholding it." Moreover, in *Barenblatt* v. *United States*, *supra*, 360 U.S. at 123–124, and *Deutch* v. *United States*, 367 U.S. 456, 469, the Court held that buried and anticipatory objections and suggestions of doubt are not sufficient to raise an objection before a Congressional committee.

Petitioner here at no time objected to the Subcommittee that the subpoena violated the Fourth Amendmend. As we have seen above (pp. 29–30), although petitioner submitted a lengthy legal document to the subcommittee, his sole contentions were that the subcommittee was violating his rights under the First Amendment and that it lacked jurisdiction to investigate beliefs and associations. While he did state that he did not understand why the Subcommittee had subpoenaed him (R. 84) and that he was subpoenaed by accident (R. 89), this was part of his contention that the Subcommittee was violating his First Amendment rights. Certainly, this claim was not clear enough to raise a Fourth Amendment claim under

the test of specificity laid down by this Court in *Barenblatt* and *Deutch*.

Petitioner claims (Pet. Br. 33 at note 9, 57 at note 53) that he could not have waived his Fourth Amendment contentions since probable cause is an element of the offense. He reasons that the statute punishes only refusal to answer questions pertinent to a pending inquiry. *Deutch* v. *United States, supra,* 367 U.S. at 469–471. But this is not the same as probable cause. Even though petitioner has not raised the contention, we have shown (pp. 23–24) that the questions here were clearly pertinent. The issue as to probable cause is entirely different—whether the Subcommittee could reasonably believe that petitioner had information of value to it in response to pertinent questions.[4]

B. THE FOURTH AMENDMENT DOES NOT APPLY TO SUBPOENAS TO TESTIFY

Even if petitioner had raised a claim under the Fourth Amendment when he appeared before the Subcommittee, the Amendment does not apply to subpoenas to testify. The Fourth Amendment of course protects witnesses who appear before Congressional committees. But we submit that the Fourth Amendment, unlike the First and Fifth, pertains only to subpoenas *duces tecum*. The language of the Amendment itself makes clear that it was intended

[4] Petitioner also claims (Pet. Br. 32, note 9) that the government cannot raise this contention because it failed to argue it in the district court or the court of appeals. A respondent is entitled, however, to raise new grounds to support a judgment below, even though the party attacking the judgment cannot do so. *E.g.*, *Jaffke* v. *Dunham*, 352 U.S. 280, 281.

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to protect "persons, houses, papers, and effects" from improper search or seizure and not, like the Fifth Amendment, to protect witnesses from being forced to testify.

This Court has never held that the Fourth Amendment is relevant to subpoenas requiring witnesses to appear and testify. In *Boyd* v. *United States,* 116 U.S. 616, and other cases cited by petitioner (Pet. Br. 34, 36–38), the Court decided that the Fourth Amendment applies to subpoenas *duces tecum,* as well as to forcible searches and seizures, because the "compulsory production of a man's private papers" "accomplishes the substantial objects of [the] acts" of "forcible entry into a man's house and searching amongst his papers." 116 U.S. at 622. In contrast, the requirement that a person appear briefly before a Congressional committee does not accomplish the substantial objects—or interfere with his rights to the same extent—as seizure of his person by arrest.

Petitioner's principal authority (Pet. Br. 35–36) for the proposition that the Fourth Amendment applies to subpoenas to testify other than the cases which concern subpoenas *duces tecum* is a general statement in the dissenting opinion of Mr. Justice Brandeis in *Olmstead* v. *United States,* 277 U.S. 438, 478:

> The makers of our Constitution * * * conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whether the means employed, must be deemed a violation of the Fourth Amendment.

This extremely broad statement has never been accepted by a majority of the Court. In addition, it was directed at physical invasions of privacy or their equivalent such as wire-tapping—which was the intrusion involved in that case. For the statement is based on a synopsis and citation of cases (see 277 U.S. at 477–478, and notes 4–10) involving physical invasion of privacy (*e.g., Weeks* v. *United States,* 232 U.S. 383), or improper use of subpoenas *duces tecum* which this Court has held have substantially the same effect as a physical invasion (*Boyd* v. *United States, supra*).[5]

The only decisions of this Court (which we or petitioner have discovered) indicating that probable cause is required in order to subpoena a person to testify are *Barenblatt* v. *United States,* 360 U.S. 109, *Braden* v. *United States,* 365 U.S. 431, and *Wilkinson* v. *United States,* 365 U.S. 399. In all of these cases, however, the Court discussed probable cause in terms of the First Amendment or a valid legislative purpose, not the Fourth Amendment. In the *Barenblatt* case, the Court stated (360 U.S. at 134): "Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable

[5] Petitioner quotes (Pet. Br. 34) from *Sinclair* v. *United States,* 279 U.S. 263, 292, that persons are "exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures * * *." The rest of the sentence, however, was "in respect of their personal and private affairs." The issue was thus whether the committee had a valid legislative purpose, not probable cause—*i.e.*, the issue was whether Congress has power to question persons as to non-legislative matters, not whether the Fourth Amendment forbids inquiry whether for a legislative purpose or not.

cause for belief that he possessed information which might be helpful to the Subcommittee." This statement suggests that if a witness was subpoenaed as the result of "indiscriminate dragnet procedures, lacking in probable cause" he might be freed from having to answer the questions. But the statement is clearly part of a discussion of a witness' rights under the First Amendment. Similarly, in *Braden* v. *United States*, 365 U.S at 435, the Court stated that "[t]he subcommittee had reason to believe that the petitioner was a member of the Communist Party, and that he had been actively engaged in propaganda efforts." At the end of this paragraph, the opinion said that "[u]pon the reasoning and authority of *Barenblatt* * * * we hold that the judgment is not to be set aside on First Amendment grounds" (*ibid.*). And in *Wilkinson*, in discussing whether the committee had a valid legislative purpose, the Court similarly said (365 U.S. at 412): "It is to be emphasized that the petitioner was not summoned to appear as the result of an indiscriminate dragnet procedure, lacking in probable cause for belief that he possessed information which might be helpful to the subcommittee."

C. IF THE FOURTH AMENDMENT DOES APPLY, IT WAS NOT VIOLATED IN THIS CASE

If the Fourth Amendment does apply to subpoenas to testify, we submit that it is less strict with regard to Congressional investigations, which merely seek testimony, than for arrests or searches and seizures. In *Oklahoma Press Publishing Co.* v. *Walling*, 327

U.S. 186, this Court held that the test to be applied under the Fourth Amendment when an administrative agency issues subpoenas *duces tecum*[*] is markedly different from the standard applicable to warrants (*id.* at 208–209):

> It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. This has been ruled most often perhaps in relation to grand jury investigations, but also frequently in respect to general or statistical investigations authorized by Congress. The requirement of "probable cause, supported by oath or affirmation," literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry.

There is no reason to apply a stricter standard to subpoenas to testify than to subpoenas *duces tecum* or to Congressional committees than to executive agencies.

Applying these standards to this case, the Subcommittee clearly had authority from Congress to investigate Communist activities (S. Res. 366, 81st Cong.,

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[*] As we have indicated (pp. 43–45), the Fourth Amendment does apply to subpoenas *duces tecum* as contrasted with subpoenas to testify.

2d Sess.; see the government's brief in *Liveright* v. *United States*, No. 11, this term) and such an investigation is within the power of Congress to conduct (*Barenblatt* v. *United States*, *supra*, 360 U.S. at 125–134). And as we show elsewhere, the Subcommittee asked questions which were pertinent to the subject under inquiry (*supra*, pp. 23–24) and had a reasonable basis for believing that petitioner had information in answer to these questions which would be of value in the investigation (*infra*, pp. 50–62). Thus, even if the Fourth Amendment applies to subpoenas to testify, as contrasted with subpoenas *duces tecum*, the subpoenaing of petitioner was fully consistent with the Fourth Amendment.

III

THE SUBCOMMITTEE'S INVESTIGATION OF COMMUNIST INFILTRATION OF NEWS MEDIA DID NOT VIOLATE THE FIRST AMENDMENT

Petitioner contends (Pet. Br. 53–57) that the Subcommittee's investigation of the press violated the First Amendment. The subject under inquiry when petitioner testified before the Subcommittee was Communist infiltration into news media, and particularly the press (see *supra*, pp. 23, 32–41). This Court has made clear that such a Congressional investigation of Communist activity in a field protected by the First Amendment is constitutional. In *Barenblatt* v. *United States*, *supra*, 360 U.S. at 125–134, the Court held that Congress could legitimately investigate Communist infiltration of education. Last Term, in *Braden* v. *United States*, 365 U.S. 431, the Court,

in upholding a Congressional investigation of Communist propaganda activities, stated that (*id.* at 435):

> * * * *Barenblatt* did not confine congressional committee investigation to overt criminal activity, nor did that case determine that Congress can only investigate the Communist Party itself. Rather, the decision upheld an investigation of Communist activity in education. Education, too, is legitimate and protected activity. Communist infiltration and propaganda in a given area of the country * * * are surely as much within its pervasive authority as Communist activity in educational institutions. * * * Information as to the extent to which the Communist Party was utilizing legitimate organizations and causes in its propaganda efforts * * * was surely not constitutionally beyond the reach of the subcommittee's inquiry.

And in *Wilkinson* v. *United States*, 365 U.S. 399, 413–414, the Court similarly upheld Congressional investigation of Communist propaganda activities, stating that this issue was "thoroughly canvassed by us in *Barenblatt*." Just as Congress can investigate Communist activities in education and propaganda, fields equally protected by the First Amendment, so Congress and therefore this Subcommittee could investigate Communist infiltration of communications and the press.

A. THE SUBCOMMITTEE WAS INVESTIGATING COMMUNIST INFILTRATION OF NEWS MEDIA, NOT NEWS MEDIA IN THEMSELVES

Petitioner contends (Pet. Br. 53–55), however, that the Subcommittee was in fact investigating the press

(or the New York Times), not Communist infiltration of news media. But this is squarely contradicted by the record and by the findings of the district court (R. 225–226). The chairman and another member of the Subcommittee (Senator Hennings) explicitly stated at the hearings (*supra*, pp. 7–8, 9), and Subcommittee counsel testified at petitioner's trial (*supra*, p. 10), that Communist infiltration of the press, not the press itself, was under investigation. All the questions asked petitioner were either directly related to Communist activities or were preliminary inquiries intended to lead up to such questions. After petitioner had testified, the Subcommittee asked other newspaper employees similar questions concerning Party activities (see, e.g., Hearings, Part 17, 1739–1743, 1761–1763, 1769–1774, 1777–1784, 1785–1787, 1790–1791). In addition, the record shows that the questions were not a mere fishing expedition, as the Subcommittee had information that Communists had infiltrated into the press (see *supra*, p. 4), and this information was confirmed by testimony taken the same day as petitioner appeared (Hearings, Part 17, pp. 1732, 1739–1740, 1777, 1791).

B. THE SUBCOMMITTEE'S SUBPOENAING OF PETITIONER WAS NOT THE RESULT OF "INDISCRIMINATE DRAGNET PROCEDURES LACKING IN PROBABLE CAUSE"

1. In *Barenblatt* v. *United States*, *supra*, 360 U.S. at 126, the Court held that, when a witness is called before a Congressional committee and refuses to testify, determination of any claim under the First Amendment "always involves a balancing by the courts of the competing private and public interests

at stake in the particular circumstances shown." The Court subsequently indicated that "the individual interests at stake [are] not subordinate to those of the state" if the witness' appearance follows from "indiscriminate dragnet procedures, lacking in probable cause * * *" (*id.* at 134). See also *Wilkinson, supra,* 365 U.S. at 412.

The standard laid down in *Barenblatt* and *Wilkinson* is clearly not the same as the "probable cause" required for arrest or search and seizure under the Fourth Amendment. The test under the Fourth Amendment as to arrests or searches and seizures is whether "the facts and circumstances within [the arresting officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" the person has committed an offense or there is contraband in the place to be searched. *Draper* v. *United States,* 358 U.S. 307, 313; *Carroll* v. *United States,* 267 U.S. 132, 162. In contrast, in *Oklahoma Press Publishing Co.* v. *Walling, supra,* 327 U.S. 186, this Court held that an executive officer and therefore *a fortiori* a Congressional committee may, consistent with the Fourth Amendment, issue a subpoena *duces tecum* if "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry" (327 U.S. at 209). We submit that the *Barenblatt* and *Wilkinson* cases laid down a similar rule as to subpoenas to testify, where First Amendment rights are involved—that a Congressional committee may properly subpoena a witness when it has reasonable basis for be-

lieving that the witness has information related to the subject under investigation which would be of value to the committee. See *United States* v. *Orman*, 207 F. 2d 148, 154–155 (C.A. 3).

First, there can be no reason to impose a stricter standard on Congressional committees for subpoenas to testify than for subpoenas *duces tecum* issued by executive agencies as in *Oklahoma Press*. The intrusion is no greater in one situation than the other. Certainly, there is no basis for imposing the same requirements on Congressional committees (before they can subpoena witnesses consistently with the First Amendment) as are imposed on arrests and searches and seizures under the Fourth Amendment. It would be strange to require the same degree of probable cause to arrest a person or use force to enter his house as to ask him questions—particularly when he is protected by the Fifth Amendment from being forced to incriminate himself. And, if Congressional committees must have the kind of proof to subpoena a witness as police do to make an arrest, the result will be seriously to hamper Congressional inquiries. The power of Congress to investigate before it legislates—to question hostile as well as friendly witnesses—is of course of great importance to the legislative process. This power necessarily includes the discretion to subpoena witnesses where there is any substantial likelihood that they possess information of value to an investigation and to possible legislation.

Second, the difference in requirements as to subpoenas on the one hand and arrests and searches and

seizures on the other was indicated in the *Barenblatt* and *Wilkinson* opinions themselves. The Court did not use the phrase "probable cause" alone—thereby conceivably suggesting the same standard as for an arrest or search and seizure under the Fourth Amendment. Rather, the Court indicated that Congressional committees must not use "indiscriminate dragnet procedures, lacking in probable cause for belief that [the witness] possessed information which might be helpful to the Subcommittee" (360 U.S. at 134; 365 U.S. at 412). We submit that this phrase suggests that Congressional committees can properly act if they have reasonable ground for believing that the witness has information which will be of value to their investigation.

Moreover, in determining that the defendant in *Barenblatt* was not subpoenaed as a result of dragnet procedures, the Court cited two earlier portions of the opinion as showing this fact (360 U.S. at 124, 125 at note 24). The first reference is to discussion showing that the witness was apprised by the subcommittee of the pertinency of the questions asked to the subject under inquiry. The second reference is to a footnote which quotes the statement of the chairman of the subcommittee at the close of the witness' testimony:

> * * * the evidence or information contained in the files of this committee, some of them in the nature of evidence, shows clearly that the witness has information about Communist activities in the United States of America, particularly while he attended the University of Michigan.

> That information which the witness has would be very valuable to this committee and its work.

These citations show that this Court was not following the strict standard of probable cause which is applied under the Fourth Amendment for arrests or searches and seizures. The references cited plainly do not meet these standards. As we will see (pp. 55–60), the record in this case gives far more details as to the information possessed by the Subcommittee showing that petitioner had information of value to the Subcommittee than is shown by the two references cited by the Court in *Barenblatt*.

Similarly, in *Wilkinson*, in demonstrating that the defendant had not been subpoenaed as a result of "an indiscriminate dragnet procedure," the Court relied on the testimony of the staff director of the committee, at the trial, that the defendant "was an active Communist leader engaged primarily in propaganda activities" (365 U.S. at 412). The footnote to this statement quotes trial testimony that the committee had earlier heard the testimony of a witness under oath identifying the witness as a Communist and that it had other information that he was leading Communist infiltration in the South. The opinion goes on to say that the staff director's testimony is supported by his statement to the defendant at the committee's hearings and evidence that the defendant had been identified as a Party member at a prior hearing. While, in this case, the Subcommittee did

not have sworn testimony that petitioner was a Party member, this was not the basic evidence relied on in *Wilkinson*. Rather, this sworn testimony was used in *Wilkinson* to support the testimony of the staff director that the Subcommittee had considerable information concerning the defendant's Party activities. Since the testimony principally relied on in *Wilkinson* did not state the source of the committee's information, it is clear that this Court was not using the standard of probable cause which is followed under the Fourth Amendment when arrests or searches and seizures are involved.

2. The trial court, as finder of facts, determined that "[t]he record of this case discloses beyond any reasonable doubt that the subcommittee had information in its possession at the time defendant was initially summoned to appear before it which established a reasonable cause for requiring his testimony" (R. 223). This finding is fully supported by the evidence.

The Subcommittee had heard testimony from a newspaperman and broadcaster, who was a former member of the Communist Party, of Communist efforts, in part successful, to infiltrate and influence the newspaper field (see *supra*, p. 4). Subsequently, as the chief counsel of the Subcommittee testified at petitioner's trial, the Subcommittee received "information that a man named Shelton, who was employed in the news department or city side of the New York Times, was a member of a communist group on the Times, was active in the affairs of that

group, and would be or should be in a position to give the committee information about the activities of that group" (R. 98; see R. 48–49, 116). This information was sent to the Subcommittee in a letter a few months before petitioner testified (R. 98, 186–187). Although the letter was signed with a pseudonym, the identity of the signer was known to the former associate counsel of the Subcommittee, Robert Morris (R. 99–100, 190–191). The same person had sent other letters to the Subcommittee, using the same pseudonym, and the information contained in these letters had been checked and found to be correct (R. 101, 190). As the chief counsel testified (R. 102):

> We had received other letters from this same individual. I knew by the appearance of the letter, the way it was typed and the pseudonym which was signed to it, that it came from the same individual who had given us leads before which proved out and concerning whom Judge Morris had stated that he knew him and that he was a reliable person.

Although the Subcommittee was still unaware of Mr. Shelton's first name, a subpoena was issued, addressed to "Willard Shelton" at the New York Times (R. 105). This was a mistake since Willard Shelton, although a newspaperman, was not employed by the Times and was not sought by the Subcommittee (R. 49, 102). Apparently, as the chief counsel surmised, the error was made in the typing section by someone who supplied the first name of the only newspaperman known to him to be named Shelton (R. 102–103).

The Subcommittee employee who went to New York to serve the subpoena discovered that there was no Willard Shelton on the New York Times (R. 49, 106). The employee was told that a Robert Shelton was employed by the Times and that he was the only Shelton on the editorial or news side (R. 49, 106). The chief counsel concluded that Robert Shelton must be the Shelton described by the informant without a first name and the Subcommittee employee was authorized by the Subcommittee chairman to serve the subpoena on petitioner (R. 106). The employee then added the words "or Robert Shelton" to the subpoena and served it on petitioner (R. 49, 105–106).

Between the time the subpoena was issued and the date of petitioner's appearance before the Subcommittee, the Subcommittee (R. 111):

> * * * made a thorough check of all the sources that were available to us to see what there might be on a Robert Shelton or what there might be on a Shelton who might be the Robert Shelton that we were talking [about]. And we accumulated those things from all the sources available to the committee and then attempted in the hearing to see if this was the same individual.

By this time, the Subcommittee had three, four or five "leads" under the name of Shelton without a first name (R. 111). Therefore, the Subcommittee desired to question petitioner concerning whether he was the Shelton mentioned in the Subcommittee's files (R. 111):

> We had here a man who was Robert Shelton, who was a newspaperman. It was of some importance to the committee, while he was on the stand, to ascertain whether he was the same person as any of these other individuals. It is a procedure which we follow wherever it is possible, where time will permit: we have a witness who may be the same as a person not adequately identified in our files.

When petitioner appeared at the executive session on December 7, 1955, he was advised by Subcommittee counsel that the purpose of his appearance was to clarify the question of identity (R. 52). Petitioner declined to cooperate with the Subcommittee by refusing to answer numerous questions (R. 52–64). The Subcommittee subsequently called petitioner's counsel and told him to have petitioner appear at hearings beginning on January 6, 1956 (R. 66). It was at the latter hearings that petitioner refused to answer the questions on which he was convicted. Thus, the subpoena—on which the mistake was initially made as to Mr. Shelton's first name—was not the basis for petitioner's appearance at the hearings which are directly involved in this case. There was no mistake as to the direction to petitioner to appear at the hearings which resulted in his contempt; the Subcommittee called petitioner's counsel and asked petitioner to appear.

We submit that at the time petitioner appeared at the open hearings the Subcommittee had reasonable ground for believing that petitioner had information that would be of considerable value. The Subcommittee had been informed that there was Communist

infiltration of the press, and also had specific information from a reliable informant that a Shelton on the editorial or news side of the New York Times was a member of the Communist Party. Since petitioner was the only Shelton fitting this description, the Subcommittee had reason to believe that petitioner was a Party member who could testify concerning Party activities in the newspaper field.

Petitioner claims (Pet. Br. 29, note 6), however, that the government cannot rely on information provided by the informant because it refused at trial to produce the anonymous letter which conveyed this information to the Subcommittee. This might be true if "probable cause" was an element of the criminal offense which the government was required to prove. This, however, is clearly not the case. Instead, the *Barenblatt* case shows that "probable cause" is one of several considerations in determining whether First Amendment rights have been violated. Therefore, we submit that, when the Court in *Barenblatt* and *Wilkinson* referred to "dragnet procedures" and "probable cause," it did not mean to suggest that the sufficiency of the information or reasons which cause a committee to call a witness should be subject to plenary judicial review. Rather, we believe, the Court intended at most to require only that Congressional committees present material showing the basis of their decision to subpoena the witness. See *Sacher* v. *United States*, 240 F. 2d 46, 50 (C.A. D.C.), vacated and remanded on other grounds, 354 U.S. 930. Here the Subcommittee's counsel described the information possessed by the Subcommittee as to petitioner's Communist activities. This evidence is sufficient

for a court to decide whether the information described by the Subcommittee constitutes "probable cause," *i.e.*, that it was reasonable for the Subcommittee to believe that it could obtain pertinent testimony from the witness.

In short, we believe that the decision whether to subpoena a witness is mainly for the legislative body. To superimpose on a trial for contempt a full-scale trial of a committee's judgment would be an invasion of the prerogative of the legislature and a serious interference with Congressional investigations. The permissible scope of a Congressional investigation, which of necessity must proceed step by step, is not to be limited by the strict requirements of a criminal prosecution.

Petitioner also quotes (Pet. Br. 8) a statement made by the Subcommittee counsel to petitioner at the executive session that petitioner was not charged with being a Communist and that counsel was greatly surprised when petitioner refused to answer questions (R. 56). Subcommittee counsel, however, fully explained this statement at petitioner's trial on the ground that petitioner had earlier in the executive session strongly indicated to the Subcommittee both by his answers to questions and his demeanor that he was not the Shelton whom the Subcommittee was seeking to question and that therefore the subpoena was wrongly issued (R. 112). Certainly, the statement of counsel at the executive session was not sufficient to overcome all the other evidence in the trial record that the Subcommittee had reasonable ground to question petitioner about Communist infiltration into

news media when he appeared at the public hearings after refusing to testify in executive session.

Even if we assume, however, that the Subcommittee did not have reasonable ground to believe that petitioner was a Party member, the Subcommittee could be absolutely certain that petitioner had valuable information to contribute. This information was whether petitioner was in fact the Shelton described in the information previously given to the Subcommittee. If he was, the meaning of the information already in the files would be clarified and there would be no need to look for another Shelton who was the subject of this information. At the least, the Subcommittee would have information that one Party member was employed, perhaps in a significant capacity, on an important newspaper. In addition, petitioner could then be thought to have information concerning Communist activity in the newspaper field. If petitioner testified that he was not the Shelton described in the Subcommittee's files, this would indicate to the Subcommittee that it would have to look further to find the subject of its information. In short, we submit that a Congressional committee can call a witness for purposes of identification where it has information concerning one of a narrowly defined group of persons. Certainly, it was not likely that there would be a large number of Sheltons on the New York Times.

Clearly, the Subcommittee reasonably believed that petitioner "possessed information which might be helpful to the subcommittee" (*Wilkinson* v. *United States, supra,* 365 U.S. at 412) and "relevant to the inquiry" (*Oklahoma Press Publishing Co.* v. *Walling,*

supra, 327 U.S. at 209. Thus, the Subcommittee could properly subpoena petitioner.

IV

PETITIONER CANNOT CHALLENGE THE GRAND JURY FOR BIAS ON THE GROUND THAT IT WAS COMPOSED IN PART OF GOVERNMENT EMPLOYEES

In his motion to dismiss the indictment, petitioner urged as the ground for granting the motion that the indictment was void and illegal "in that there were less than 12 members of the Grand Jury who concurred in finding the indictment who were free from prejudice or bias against this defendant" (R. 3). Alternative to immediate dismissal of the indictment, petitioner sought a hearing to give him an opportunity to demonstrate the bias (R. 3–4). In support of these contentions, he submitted an affidavit reciting that fourteen of the twenty-three members of the grand jury were employed by the United States Government, and that, being so employed and thus subject to the government's security programs, they were so instilled with the fear of creating the appearance of sympathetic attitude toward any person accused of Communism that they could not consider the facts presented to them with open minds, free from bias and prejudice (R. 4–8). The motion was denied without opinion (R. 19). We submit that the order was correct.

A. THE PRESENCE OF GOVERNMENT EMPLOYEES ON A GRAND JURY DOES NOT AUTOMATICALLY INVALIDATE THE INDICTMENT

Petitioner's broad contention is that a person accused of "refusal to reveal whether he was a member

of the Communist Party and give other information on his Communist connections" (R. 5) is entitled to be indicted by a grand jury on which no government employee sits. This argument is conclusively answered by the cases involving government employees on petit juries. It has long been settled that government employees, in the absence of a showing of actual bias, are not disqualified for service on petit juries in federal criminal prosecutions. *United States* v. *Wood*, 299 U.S. 123; *Frazier* v. *United States*, 335 U.S. 497; *Dennis* v. *United States*, 339 U.S. 162. This is true even though one or more of the employees are employed in the very department charged with responsibility for enforcing the statute which the defendant is charged with having violated. *Frazier* v. *United States, supra.* And the rule was adhered to even though the defendant was a prominent Communist charged with contempt of the House Un-American Activities Committee and where the trial was held after the promulgation of the first "Loyalty Order." *Dennis* v. *United States, supra.* Of course, the accused must be given the opportunity to prove actual bias at the *voir dire* examination and thus to challenge particular government employees for cause (*Dennis* v. *United States, supra*, 339 U.S. at 171–172; *Morford* v. *United States*, 339 U.S. 258), but in this respect government employees occupy no different status from other prospective jurors, any of whom are challengeable for cause when actual bias appears.

The above cases, involving the petit jury, apply *a fortiori* to petitioner's contention as to grand juries.

For, as we shall see below, defendants have traditionally been afforded far more protection from possible bias as to jurors on petit juries than on grand juries.

B. PETITIONER WAS NOT ENTITLED TO A HEARING, IN ORDER TO SHOW THAT THE GRAND JURORS WERE BIASED, BECAUSE HE FAILED TO ALLEGE SPECIFIC AND CONVINCING FACTS DEMONSTRATING THE STRONG BIAS OF INDIVIDUAL GRAND JURORS

1. In our system of justice, the courts have been traditionally and continually reluctant to scrutinize grand jury proceedings. For example, this Court has held that a defendant is not entitled to a hearing in order to challenge an indictment on the ground that the grand jury has considered incompetent or even illegally obtained evidence. *Costello* v. *United States,* 350 U.S. 359; *Lawn* v. *United States,* 355 U.S. 339, 348–350. This judicial reluctance to scrutinize grand jury proceedings is based on at least three related reasons. First, the grand jury has always been a purely accusatory body which does not decide the question of guilt or innocence but merely whether the defendant should be remanded for trial. See *Hale* v. *Henkel,* 201 U.S. 43, 65. As Chief Judge Swan stated, "an indictment is, after all, no more than an accusation." *United States* v. *Remington,* 191 F. 2d 246, 252 (C.A. 2), certiorari denied, 343 U.S. 907. Second, if the courts allowed defendants to challenge various aspects of the grand jury proceeding, the result would be a second elaborate hearing, in addition to the trial itself, before guilt or innocence was determined. This would mean delay

and inefficiency in the administration of criminal justice. See *United States* v. *Remington, supra,* 191 F. 2d at 252. Finally, the defendant is guaranteed detailed and elaborate protection, both at the trial and appellate levels, as to the proceeding at which his guilt or innocence is determined.

2. The history and purpose of grand juries suggest not only the reluctance of the courts to scrutinize grand jury proceedings in general but also their reluctance to examine in particular the beliefs, motives, and prejudices of the jurors. This can readily be seen from the absence from ordinary grand jury procedures of anything comparable to the *voir dire* examination, the historic guarantee against bias and partiality on the part of members of the petit jury. It reflects the assumption, dating at least from the time of our Constitution, that grand juries were not expected to be unprejudiced.

The grand jury has traditionally served as a conduit to report the common knowledge of the community to the courts. Orfield, *Criminal Procedure from Arrest to Appeal* (1947), 144–145. The fact that it might have formed a prejudgment as to the truth of an accusation was not considered improper (*United States* v. *White,* Fed. Cas. No. 16,679 (C.C. D.C.)); nor was the fact that it might even have prejudices against a possible accused unrelated to the circumstances of the particular case. Cf. *United States* v. *Smyth,* 104 F. Supp. 283, 301 (N.D. Calif.); *United States* v. *Rintelen,* 235 Fed. 787, 789 (S.D. N.Y.); see also *United States* v. *Fujimoto,* 102 F.

Supp. 890, 896 (D. Haw.). The grand jurors took oaths not to allow prejudice to influence their judgment, and this was apparently regarded as a sufficient safeguard.

Although the growth in the size of the communities for which grand juries now act means that they are far less likely than earlier to have prior personal information about their accusations, this same growth also means that grand jurors are more likely to have biases with respect to classes of persons or types of crimes, rather than with respect to the individual accused. A grand jury in a modern urban community will, in the course of its service, have brought before it a wide gamut of crimes and persons. It would be a serious impairment of the work of such juries if defendants were free to invalidate indictments on a showing, in general terms, that there were community prejudices of one sort or another probably operating on the grand jury to their disadvantage, or to be free to delay the process of a criminal case by demanding a hearing in order to rummage among the thoughts of individual grand jurors to discover possible prejudices. A "trial of the grand jury," particularly on the basis of unsubstantiated allegations, would be a serious obstacle to disposing expeditiously of criminal charges on their merits. And it would be a serious addition to the burdens incident to service on grand juries. It follows, therefore, that the practical operation of the grand jury system requires, as we show below the cases hold, that a showing of grand jury bias must be strong and specific and relate to in-

dividual grand jurors to invalidate an indictment, and that, absent an allegation of facts which if proven would constitute such a showing, a general exploration to discover such bias cannot be permitted.

3. This Court has never said what kinds of bias, if any, would disqualify a grand juror or what kind of allegations are necessary in order to require a hearing on this issue. In *Hale* v. *Henkel,* 201 U.S. 43, 59, the Court said that it is the function of a grand jury "to stand between the prosecutor and the accused." See also *Ex parte Bain*, 121 U.S. 1, 10–11. This means that a grand jury which was merely the tool of the prosecution would not be a proper grand jury; but it sheds very little light on any criteria by which to judge whether a particular jury is, in fact, a tool of the prosecution. Certainly, not every circumstance which might indicate bias on the part of one or more grand jurors would indicate that the jury was so pliant that it would do whatever it was told. Similarly, in *Lawn* v. *United States*, 355 U.S. 339, 349, and *Costello* v. *United States,* 350 U.S. 359, 363, the Court indicated that an indictment must be returned by an unbiased grand jury. But again no standards which would require dismissal of the indictment were sugggested.

There is only one group of cases in which this Court has considered squarely the composition of grand juries. In these cases, the Court has insisted that grand jury panels be broadly representative of the community, and has struck down indictments returned by grand juries drawn from panels from which particular groups—for example, persons of Mexican an-

cestry, Negroes, and women—had been deliberately excluded. *Hernandez* v. *Texas*, 347 U.S. 475; *Cassell* v. *Texas*, 339 U.S. 282; *Ballard* v. *United States*, 329 U.S. 187; cf. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (wage earners). In so holding, a plurality opinion of the Court has indicated that an accused is entitled to indictment by a "fair and impartial grand jury" (*Cassell* v. *Texas*, *supra*, 339 U.S. at 282), which suggests that a grand jury made up with systematic discrimination cannot be fair and impartial in considering matters involving persons from the excluded group.[1]

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[1] Cf. *Strauder* v. *West Virginia*, 100 U.S. 303, 309, which dealt with petit jury panels from which Negroes had been deliberately excluded:

> It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State should deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the states to extend equality of protection.

Nonetheless, we submit that this Court's decisions holding that the arbitrary exclusion of entire groups from grand juries is unconstitutional do not rest in any substantial way on the view that members of the excluded group may be subjected to improper biases if grand jurors are drawn solely from the excluding group. Rather, those cases turn principally on the ground that the grand juries so chosen are unrepresentative of the community, and therefore are not proper grand juries—a ground which reflects the history of grand jury proceedings to which we referred above. It is plain that it is not merely general prejudice against the accused's class that is involved, because the remedy of the Court has been to require the selection of grand jury panels without the arbitrary exclusion. Such a remedy does not provide for the exclusion of those who might still be prejudiced or the inclusion of those from the formerly excluded class in every case involving other members of the class; it merely insures the presence, at random, of the previously excluded group on grand jury panels, although not necessarily on particular grand juries. Any serious prejudice against members of the previously excluded group is not likely to be erased or rendered ineffective by the inclusion of members of that group on a jury panel, and even the inclusion of a member on a particular grand jury would not prevent other grand jurors from voting in accordance with their prejudices.

Thus, the Court has implicitly recognized in these decisions that various general community prejudices are not a basis for challenging an indictment which has been returned by a grand jury, so long as the

panel from which the jury was drawn was representative of the entire community, with the resulting assumption that any given grand jury, drawn by lot from the panel, will similarly be representative of the community.[8] In short, it is not possible prejudice which the decisions of the Court have sought to guard against, but rather unfair representation. The rule which petitioner asks the Court to adopt in this case, on the other hand, would insure precisely the opposite result—grand juries which are not representative of the community, particularly in the District of Columbia—for it would systematically exclude from such juries all members of a certain class, namely, government employees.

Most of the courts which have considered the issue of grand-jury bias have held that, in the absence of a statute, bias on the part of one or more grand jurors does not invalidate an indictment.[9] See, *e.g.*, *United States* v. *Rintelen*, 235 Fed. 787, 789 (S.D. N.Y.); *United States* v. *Smyth*, 104 F. Supp. 283, 300–301 (N.D. Calif.); *United States* v. *Knowles*, 147 F. Supp. 19 (D. D.C.); see also the cases collected in support of this proposition in Annotation, *Prejudice of Member of Grand Jury Against Defendant as Ground of Attack on Indictment*, 88 A.L.R. 899, and 24 Ameri-

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[8] Cf. *Ruthenberg* v. *United States*, 245 U.S. 480 (fact that no Socialists were on grand jury held not a basis for challenging indictment).

[9] Cases stating that biased grand jurors may or should be excluded by the judge are of course not controlling as to the issue before the Court, *i.e.*, whether such bias requires that an indictment, on which a defendant has been tried and convicted by an unbiased judge or petit jury, must be dismissed.

can Jurisprudence, *Grand Jury*, § 10. Many courts have so held even on records which strongly showed that some of the grand jurors were biased. See, *e.g.*, *United States* v. *Williams*, Fed. Cas. No. 16,716 (C.C. D.Minn.) (prosecuting witness was a member of the grand jury); *Coblentz* v. *Maryland*, 164 Md. 558, 166 Atl. 45 (indictment against defaulting bank official returned by grand jury some of whose members had lost money as a result of default); *State* v. *Easter*, 30 Ohio St. 542 (murder indictment returned by grand jury which included nephew of deceased); *Rice* v. *State*, 204 Ark. 236, 161 S.W. 2d 401 (indictment returned by grand jury which included unsuccessful political opponent of accused); see also *United States* v. *Caldwell*, 8 Alaska 117, 121–122; *Collins* v. *State*, 3 Ala. App. 64, 67, 58 So. 80.[10]

Some courts, however, have invalidated an indictment when the bias was particularly strong and clear. See, *e.g.*, *State ex rel. Reichert* v. *Youngblood*, 73 N.E. 2d 174 (Ind.) (grand juror reported to have boasted, "I know how I got on the grand jury. We are going to get a Mayor * * *)." There the court quoted with approval (*id.* at 179):

> The general rule is that neither the bias nor prejudice of a grand juror, nor his interest in a prosecution (other than a direct pecuniary interest), nor the fact that he has formed, or expressed an opinion, will so disqualify him as

[10] And California has, by statute, expressly withdrawn an earlier statutory right to challenge a grand juror or attack an indictment on the ground of prejudice. *People* v. *Kempley*, 205 Cal. 441, 446–448, 271 Pac. 478, 480–481.

> to render invalid indictments returned by the grand jury. * * * But we know of no authority which goes so far as to hold that this would be true where jurors had determined, through malice or bribery, to violate their oaths. It is the difference between honest error, to which all men are subject, and the wilful corruption which distinguishes the malefactor.

Even when it is recognized that some kinds of bias may invalidate an indictment, it is required that the showing of that bias be made in specific terms, as to individual grand jurors, rather than in the form of a mere general allegation of prejudice. In *Cleveland* v. *United States*, 146 F. 2d 730, 732–733 (C.A. 10), affirmed, 329 U.S. 14, it was alleged that the indictment against the defendant for violation of the Mann Act and kidnapping resulted from a factional dispute in the Mormon Church, and "that the foreman of the grand jury was a prominent and dominating figure in the high priesthood quorums of the church; that, upon information and belief, a large majority of the grand jurors, if not all of them, were likewise influential members of the church; and that the indictment was returned in a spirit of animosity and enmity toward the defendant." The court rejected this showing as insufficient, stating (146 F. 2d at 732–733):

> Except the ex parte affidavit attached to the motion, which contained many allegations predicated upon information and belief, there was no showing that the foreman or any other member of the grand jury belonged to any particular

> religious sect, or that he bore any animosity, enmity, or prejudice against the defendant. Neither was there any showing that due to prejudice or other like attitude toward the defendant, the foreman or any other member exerted or sought to exert influence with members of the body in bringing about the return of the indictment. Assuming, without so deciding, that the indictments were subject to attack on the ground indicated, the motions and ex parte affidavits, alone and without more, were not enough to warrant the quashing of them.

In *Emspak* v. *United States*, 203 F. 2d 54 (C.A. D.C.), reversed on other grounds, 349 U.S. 190, and *Quinn* v. *United States*, 203 F. 2d 20 (C.A. D.C.), reversed on other grounds, 349 U.S. 155, the witnesses convicted of contempt of Congress claimed, as in this case, that the indictment was invalid because some of the grand jurors were government employees and asked for a hearing at which they could show bias. The defendants in those cases introduced considerable evidence by way of affidavits and exhibits, unlike petitioner, who relied entirely on his counsel's affidavit (see *infra*, pp. 76–77), to show that "a miasma of fear" had developed among government employees due to a loyalty order and investigation which would make them afraid to vote for a person alleged to be a Communist. See *Emspak* v. *United States*, 203 F. 2d at 58–59. The court of appeals rejected the attacks on the indictments in both cases. *Emspak*, 203 F. 2d at 56, 58–60; *Quinn*, 203 F. 2d at 25. The plurality opinion in *Emspak* explained (203 F. 2d at 59):

> No claim was made that any grand juror was biased against this appellant personally. We think that under the circumstances presented to the court there was no indication that Government employees would not be suitable grand jurors in respect of the charge that was before them in this particular case.

In *United States* v. *Remington, supra,* the defendant alleged that the foreman of the grand jury had a financial interest in a book written by the government's chief witness. The Second Circuit, however, refused to allow the defendant the opportunity to examine all the grand jury minutes [11] on a hearing to show that the foreman had unduly influenced the grand jury to secure an indictment. The court reasoned that while "some abuses may thus go uncorrected," "we are unwilling to turn the indictment procedure into a separate trial" (191 F. 2d at 252).

The New York courts have required a specific showing of bias even under a statute which permits a person to challenge a grand juror on grounds of bias. The statute allows such a challenge if it appears "That a state of mind exists on [the grand juror's] part in reference to the case or to either party, which satisfies the court, in the exercise of a sound discretion that he cannot act impartially and without prejudice to the substantial rights of the party challenging." New York Code of Criminal Procedure, § 239(6); see also *id.* § 376(2). This

[11] The court ordered the minutes of the defendant's own testimony turned over on other grounds, and said that he could use these minutes to show undue influence.

provision has been interpreted to mean that there must be a showing of actual bias on the part of an individual juror, as contrasted with implied bias, in order to disqualify the juror. *People* v. *Prior*, 268 App. Div. 717, 54 N.Y.S. 2d 150, 153, affirmed, 294 N.Y. 405, 410–411, 63 N.E. 2d 8, 10.

The plurality opinion in *Dennis* v. *United States*, 339 U.S. 162, stated that a defendant is not entitled even to the disqualification of a petit juror in the federal courts unless he can show "actual bias" of particular jurors. *Id.* at 168–172. In *Dennis*, the defendant had been convicted of contempt for refusing to answer questions concerning Communist activities asked by the House Un-American Activities Committee. The defendant claimed that a "Loyalty Order" of the federal government created an aura of surveillance and intimidation which would make it impossible for government employees to judge impartially a case involving Communism. The plurality opinion rejected the defendant's contention on the ground that, while the guarantee of an impartial trial requires that no petit jurors have an actual bias against the defendant, it does not disqualify petit jurors merely because of an "implied bias" resulting from their relationship with the government. As we have indicated above (pp. 63–64), if a defendant must show that individual petit jurors are actually biased in order to disqualify them, *a fortiori* he has at least the same burden in order to disqualify grand jurors. And even if "implied bias" is sufficient to disqualify petit jurors for cause, as the concurring and dissenting

opinions in *Dennis* state, we submit that actual bias is at least required with regard to grand jurors.

4. Petitioner did not allege the specific and convincing facts of strong bias in individual grand jurors necessary to entitle him to a hearing—even if we assume, contrary to the holdings of numerous cases (see *supra*, pp. 70–71), that an indictment can be challenged on the ground of the bias of one or more grand jurors when the allegations are specific, individual, and convincing.

The affidavit in support of the motion for a hearing (R. 4–8) amounted, in substance, to no more than an offer to adduce evidence that there existed among government employees *in general* such a "climate of opinion, fear and intimidation" as to make it likely that any individual employee of the government would be afraid to vote against the return of an indictment in any case which was in any way connected with charges of "Communism, membership in the Communist Party, or association with members of the Communist Party, present and past." These allegations were insufficient for two reasons. First, even if petitioner had alleged specific facts showing deep fear among government employees generally, he failed to allege such fear (as well as the grounds supporting the allegation) as to the individual government employees on the particular grand jury. Thus, even if petitioner's allegations are true, this does not establish that any of the government employees on the grand jury which returned this indictment were intimidated to the extent of disregarding their honest convictions. The lack of specificity as to individual

grand jurors shows that petitioner hoped to conduct a general exploration into the lives and beliefs of the grand jurors. A similar attempt was rejected by the Court of Appeals for the District of Columbia in *Emspak* v. *United States* and *Quinn* v. *United States* (see *supra*, pp. 73–74), where the defendants, unlike petitioner here, introduced affidavits and exhibits providing considerable detail as to fear among government employees generally. Thus, even if a hearing had been awarded and petitioner had proved his allegations, this would not have been a showing of specific and strong bias in a particular grand juror or jurors—which is the only kind of a showing under the decisions that could suffice to invalidate an indictment. Since petitioner's general allegations, assuming *arguendo* that they are correct, were not sufficient to invalidate the indictment, he was not entitled to a hearing in order to prove these insufficient allegations.[12]

Second, petitioner failed even to state the facts which he hoped to show in order to demonstrate that there existed a climate of great fear and intimidation among government employees generally as a result of the security program. His basic contention is that a security program, almost by definition, instills fear. For petitioner merely makes conclusory assertions about a climate of fear (Affidavit, points 7–9, R. 5–6),

[12] The situation is comparable to a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The plaintiff is not entitled to a trial to determine the truth of allegations which, even if true, do not entitle him to relief.

states facts which he hopes to show at the hearing but which he does not swear exist (Affidavit, points 10–11, R. 7–8), and claims that government employees under investigation were asked their opinion of cases involving Communism and Congressional investigatory committees (Affidavit, points 12–13, R. 8). Thus, petitioner is seeking a hearing in order to conduct a general exploration into the motives and beliefs of fourteen grand jurors. No court, as far as we have been able to determine, has ever allowed such a hearing.[12]

V

THE INDICTMENT WAS NOT REQUIRED TO SPECIFY THE SUBJECT UNDER INQUIRY

In his motion to dismiss the indictment, petitioner contended that the indictment was defective for fail-

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[12] The inadequacy of petitioner's demand for a hearing is underlined by the provisions of Rule 6 of the Federal Rules of Criminal Procedure. Rule 6(d) provides that "no person other than the jurors may be present while the grand jury is deliberating or voting." Rule 6(e) provides that the "deliberations and the vote of any juror may be made * * * only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Under these provisions, a grand juror is forbidden, unless upon the order of the court, to disclose to the United States attorney or anyone else in the executive branch of the government how he or any other grand juror voted on a particular matter.

In view of these provisions designed to maintain the traditional secrecy of grand jurors' voting and deliberations in order to protect them from just the kind of harassment conjectured by petitioner, it is highly unlikely that grand jurors are intimidated by the possibility of security proceedings against them into violating their responsibilities.

ure to plead "the nature of the 'question then under inquiry' to which the questions addressed to defendant are alleged to be relevant" (R. 3). It is clear, however, that an indictment which pleads, in the words of the statute, that the questions defendant refused to answer were "pertinent to the question then under inquiry" (R. 1) is, without additional description of the subject under inquiry, sufficient to charge a violation of 2 U.S.C. 192.

Rule 7(c) of the Federal Rules of Criminal Procedure provides that:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

It is well established that indictments in the statutory language are ordinarily sufficient under Rule 7(c). In *United States* v. *Debrow*, 346 U.S. 374, the indictment charged, in the language of 18 U.S.C. 1621, that petitioner committed perjury by "unlawfully, knowingly and wilfully, and contrary to such oath, stat[ing] a material matter which he did not believe to be true." *Id.* at 375. Rejecting the contention that failure to allege the name of the person who administered the oath and his authority to do so invalidated the indictment, this Court stated (*id.* at 377–378):

> The charges of the indictments followed substantially the wording of the statute, which embodies all the elements of the crime, and such charge clearly informed the defendants of that with which they were accused, so as to enable them to prepare their defense and to plead the

> judgment in bar of any further prosecutions for the same offense. It is inconceivable to us how the defendants could possibly be misled as to the offense with which they stood charged. The sufficiency of the indictment is not a question of whether it could have been more definite and certain.

In *Markham* v. *United States*, 160 U.S. 319, 325, the Court held that a simple averment that the false statement "was material to an inquiry then pending" (*id.* at 320) was sufficient to charge the materiality element of a perjury offense. Accord, *United States* v. *Kennefick*, 144 F. Supp. 596, 598 (N.D. Ill.) The holding in *Markham* is directly applicable to the instant case. For the pertinency of the questions (which a witness refuses to answer) to the subject under inquiry by a Congressional committee "is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime." *Sinclair* v. *United States*, 279 U.S. 263, 298. See also *Berger* v. *United States*, 295 U.S. 78, 82; *Hagner* v. *United States*, 285 U.S. 427, 431–433.

It is inconceivable, in the words of *Debrow*, that petitioner could have been misled as to the offense with which he stood charged. Petitioner received ample information from the indictment in order to prepare his defense and to prevent a second prosecution for the same offense. As to the possibility of a second prosecution, the indictment specified the Subcommittee holding the hearings, the time of the hearings, and the questions which petitioner refused to answer at those hearings. With respect to preparing

his defense, petitioner was apprised at the time of the hearings before the Subcommittee as to the subject under inquiry (see *supra*, pp. 32–33), and it was obvious that the transcript of the hearings would be relied on by the government at the trial. Moreover, if petitioner was surprised at trial, he could have moved for a continuance. The test is not whether the government could have alleged the subject under inquiry in the indictment, nor whether such an allegation would have been useful to the defendant—as *Debrow* phrased it, "[t]he sufficiency of the indictment is not a question of whether it could have been more definite and certain" (346 U.S. at 378).

The courts of appeals have expressly held that an indictment alleging that a witness has wilfully refused to answer questions asked by a Congressional committee need not specifically state the subject under inquiry. In *Barenblatt* v. *United States*, 240 F. 2d 875, vacated and remanded on other grounds, 354 U.S. 930, and ultimately affirmed, 360 U.S. 109, the Court of Appeals for the District of Columbia Circuit upheld an indictment which is identical in this respect to the indictment in this case (240 F. 2d at 878):

> * * * it appears that the indictment stated all the elements of the offense charged and served notice on appellant as to what conduct on his part constituted the alleged offense. This satisfies the requirements of Fed. R. Crim. P. 7(c), 18 U.S.C.A.

Likewise in *Sacher* v. *United States*, 252 F. 2d 828 (C.A. D.C.), reversed on other grounds, 356 U.S. 576, the court of appeals, on remand from this Court for reconsideration of the case in light of *Watkins* v.

United States, 354 U.S. 178, stated that (252 F. 2d at 830–831):

> In our view nothing said or implied in the Watkins opinion suggests the Court intended to interpret Rule 7(c), Fed. R. Crim. P., 18 U.S.C.A., to require that an indictment under 2 U.S.C.A. § 192 recite details of the authority and scope of this inquiry. We see no reason to alter our earlier holding that the indictment is sufficient.

And in *United States* v. *Josephson*, 165 F. 2d 82, certiorari denied, 333 U.S. 838, the Court of Appeals for the Second Circuit upheld an indictment which simply said that the defendant refused to testify "on matters of inquiry committed to said Committee" [14] (*id.* at 85):

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[14] It has been suggested that *United States* v. *Lamont*, 236 F. 2d 312 (C.A. 2), holds to the contrary. In that case, the district court held that an indictment under 2 U.S.C. 192 must set forth the authority of the Congressional committee before which the alleged contempt occurred, that the inquiry was within the scope of authority granted to the committee, that the questions which the witness refused to answer were pertinent to the subject matter of inquiry being conducted by the committee, and that the refusals were wilful. 18 F.R.D. 27, 37. The court held that the requirement as to pertinency was satisfied by an allegation that the questions were pertinent. *Id.* at 32. In affirming dismissal of the indictment, the Court of Appeals for the Second Circuit did not reach the issue as to pertinency. It held only that the indictment failed to allege the authority of the committee to conduct the inquiry and found, as a result of judicial notice, that the inquiry was in fact outside the scope of the committee's authorizing resolution and hence its jurisdiction. The court of appeals stated that "[t]he result might well be different were this a case of a committee created by Congress to hold hearings for a specific purpose, with the inquiry in question apparently falling within the assigned purpose" (236 F. 2d at 316, note 6). The court then cited the *Josephson* case, *supra*.

> The above quoted indictment conforms to the requirements of Rule 7(c) * * * and was rightly held sufficient. Indeed, it is a good example of "a plain, concise and definite written statement of the essential facts constituting the offense charged."[15]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court of appeals should be affirmed.

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NOVEMBER 1961.

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[15] Petitioner does not renew in his brief on the merits the contention which he made in his petition (Pet. 30) that the district court erred in fining petitioner separately in each of two counts. Under 2 U.S.C. 192 each refusal to answer a pertinent question is a separate offense. While *Yates* v. *United States*, 355 U.S. 66, 72–74, holds that a witness can be punished only for one contempt no matter how many questions he refuses to answer if he "carve[s] out an area of refusal" or a "generally defined area of interrogation," petitioner made no general refusal to answer all questions in a particular area. Moreover, the record in this case does not suggest any attempt by the Subcommittee to multiply contempts. See also *United States* v. *Emspak*, 95 F. Supp. 1012 (D. D.C.), affirmed, 203 F. 2d 54 (C.A.D.C.), reversed on other grounds, 349 U.S. 190.

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No. 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

ROBERT SHELTON,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner contends in his initial brief in this Court (I) that he was subjected to compulsory interrogation by the Subcommittee without probable cause and (II) that the "question under inquiry" supplied by the Government in its bill of particulars precludes a finding that petitioner was apprised of a precise question under inquiry at the hearing and precludes a conviction on a different question under inquiry at the trial.[1] Unable to answer directly peti-

[1] Petitioner's brief also contends (Points III, IV) that the conviction must be reversed because the indictment failed to state the "question under inquiry" and because petitioner was deprived of his right to a fair and impartial grand jury. Petitioner's brief on these two points relies upon the brief of petitioner in *Russell* v. *United States*, No. 8, and petitioner relies for reply to the Government's argument on these two points upon the oral presentation to be made by counsel for petitioner in No. 8.

tioner's contentions on either of these points, the Government's brief advances wholly new "confession-and-avoidance" arguments in this Court. Concerning probable cause, the Government now asserts that the Fourth Amendment is inapplicable to compulsory Congressional interrogation and that the First Amendment provides only a diluted standard of "cause" and one whose observance in a particular case is not open to judicial review. Concerning the bill of particulars on the "question under inquiry", the Government now asserts that this issue is not preserved on appeal and that the receipt of contradicting evidence at the trial constituted automatic amendment of the bill of particulars. As we demonstrate below, the Government's new arguments only reenforce the necessity of a reversal of petitioner's conviction if Congressional inquiries and federal criminal trials are to meet minimal standards of procedural regularity and fair notice.

I

The Fourth, Fifth and First Amendments, Jointly and Severally, Forbid Affirmance of Petitioner's Contempt Conviction on a Record Devoid of Evidence That the Subcommittee Had Cause for Interrogating Him.

The prosecution opened in the District Court with the Government asserting the right of a Congressional committee to call "a man off the street" and interrogate him by compulsory process concerning possible Communist associations (R. 40).

The prosecution winds up in this Court with the Government seeking to protect the conviction predicated upon its "man off the street" contention by a newly conceived, three-step argument on probable cause, as follows:

(i) that the Fourth Amendment's probable cause requirement does not apply to compulsory Congressional interrogation;

(ii) that under the First Amendment, which admittedly does apply to such interrogation, Congressional committees may compel a witness to answer on mere likelihood rather than actual probability that the witness has relevant information;

(iii) that a committee's failure to meet even this "likelihood" requirement of the First Amendment is judicially unreviewable in a contempt prosecution.

It is readily apparent that this three-step progression is only a more refined version of the "man off the street" contention advanced by the Government in the District Court and thus the Government has now come full circle back to its initial trial position. It might suffice for petitioner simply to point out that the result for which the Government now contends would put Congressional process totally beyond the pale of judicial review and would permit the very dragnet inquiries against which this Court has repeatedly inveighed. As we shall show, however, we need not rest upon the grotesque *result* of the Government's argument, for each of the three steps of its progression—each of which must be independently accepted by this Court for an affirmance—is separately and patently erroneous.[2]

[2] The Government's position on whether petitioner adequately preserved the Fourth Amendment probable cause defense before the Subcommittee is confusing at best. While the Government appears to be urging waiver of Fourth Amendment rights (pp. 41-43), the Government's brief elsewhere expressly concedes (p. 14) that petitioner's objection before the Subcommittee "appears . . . to raise the issue of 'probable cause'" and that (p. 30) petitioner's objection there "seems to claim that the Subcommittee did not have probable cause to subpoena him. . . ."

A. *The Government's Contention that the Fourth Amendment Does Not Apply to Compulsory Congressional Interrogation is Erroneous*

The Government is aware that its probable cause argument stands or falls on its view that the Fourth Amendment is inapplicable to Congressional interrogation. Rather than contending that there is an adequate showing of probable cause on this record, the Government instead places its emphasis on its view that the Subcommittee was not required to have probable cause for its interrogation of petitioner. Indeed, it expressly concedes (p. 59) that it "might be true" that, if the Subcommittee was required to have probable cause for interrogating petitioner, then within normal Fourth Amendment principles this record fails to make an appropriate showing.

The Government's rash argument (p. 44) that the Fourth Amendment affords no protection against "the requirement that a person appear briefly before a Congressional committee", is supported neither by history, nor precedent nor logic. Of the significant pre-constitutional history set forth in petitioner's brief (pp. 38-49) demonstrating the precise applicability of the Fourth Amendment right of privacy to the seizure and interrogation of the person no less than his possessions, the Government says nothing. Of the relevant portions of this Court's landmark precedents in *Boyd* and *Brimson*, set forth in petitioner's brief (pp. 36 to 38), the Government likewise says nothing. And re-

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Since the Government thus twice concedes that petitioner did raise "probable cause", its suggestion that he should in addition have made specific reference to the Fourth Amendment (the only constitutional provision containing the words "probable cause") approaches absurdity. In any event, as pointed out in our initial brief (p. 32, n. 9), the Government's waiver contention, made for the first time in this Court, is also wrong on the facts and wrong on the law.

garding the specific assertions of this Court in *Watkins*, *Barenblatt* and *Wilkinson*, that "search and seizure" and "probable cause" requirements do apply to Congressional interrogation, the Government now suggests that this Court was using Fourth Amendment terminology to indicate that the First Amendment does, and the Fourth Amendment does not, apply. Nor does the Government give any reason or logic for its contention that the historic privacy guarantees of the Fourth Amendment apply to a man's papers and possessions but not to his thoughts and his expressions.

The restrictive view of the Fourth Amendment tendered to this Court by the Government comes much too late in the development of our constitutional heritage. The Government having made no serious effort to defend petitioner's conviction if the probable cause requirement of the Fourth Amendment is applicable, the Court need go no further to reverse petitioner's conviction than to state what petition hardly deemed necessary of expression—that *Watkins*, *Barenblatt* and *Wilkinson*, applying "search and seizure" and "probable cause" to Congressional inquiry, were intended to prescribe the applicability of the Fourth Amendment thereto. But even if, for argument's sake, it were assumed that "the requirement that a person appear briefly before a Congressional committee" is somehow outside probable cause and due process protections[3] and subject only to First Amendment guarantees, as the Government urges, it still does not follow that less cause or justification is required for a compulsory Congressional search of a man's

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[3] While the Government seeks, albeit unsuccessfully, to explain away the applicability of the Fourth Amendment, it makes no reference whatever to the Fifth Amendment requirement of due process, equally relied upon by petitioner to bar his conviction on the present record (R. 37, 181, 210). It is too late in the day to contend that Congressional process need not be due process. *Watkins* v. *United States*, 354 U.S. 178.

mind under the First Amendment than for a constable's search of his papers and effects under the Fourth Amendment.

B. *The Government's Contention that under the First Amendment Congressional Committees May Interrogate on Mere Likelihood Rather than Actual Probability is Erroneous*

Having urged this Court to substitute the First Amendment for the Fourth Amendment as the constitutional guarantee against arbitrary Congressional interrogation, the Government then seeks, as the second step in its progression, to dilute the postulated First Amendment protection. It asserts (p. 51) that this protection is "not the same as the 'probable cause' required for arrest or search and seizure under the Fourth Amendment." The Government urges that under the First Amendment, if "committees must have the kind of proof to subpoena a witness as police do to make an arrest, the result will be seriously to hamper Congressional inquiries," and that therefore Congressional committees must have "discretion to subpoena witnesses where there is any substantial likelihood that they possess information of value . . ." (Brief, p. 52). Having first urged that cause to subpoena a witness before a Congressional committee is only guaranteed by the First Amendment and not by the Fourth Amendment, the Government then urges that a Congressional committee does not require probable cause but merely "any substantial likelihood" of the witnesses' knowledgeability, to be determined in the committee's "discretion."[4]

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[4] The Government nowhere makes clear the exact meaning of its less-than-probable-cause standard. Once, however, "probability" is no longer the standard, it is doubtful whether there is any stopping place short of mere "possibility" or "chance". Significantly, the Government would give greater latitude to a compulsory Congressional inquiry without probable

The Government's diluted standard of "likelihood" and "discretion" would invite Congressional committees to engage in dragnet and haphazard inquiry and to do so in the most delicate areas of political freedom and personal belief and expression. If the danger to constitutional freedoms which this doctrine would create is not adequate answer to the Government's position, the history of the bill of rights demonstrates that, far from attenuated applicability, the privacy guarantees of the Constitution have *additional significance* in areas of First Amendment concern. Only last year, this Court emphasized that "The bill of rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus* v. *Search Warrants*, 367 U.S. 717, 729. Far from approving diminished procedural rights in areas of First Amendment protection, the Founding Fathers sought procedural guarantees against dragnet inquisition to prevent a repetition of Star Chamber and High Commission abuses. To the extent that procedural First Amendment protections come into play in the compulsory interrogation of the citizen, as the Government concedes they do, Congressional committees are not thereby subject to diminished but rather to more stringent requirements of fairness and "cause" in the use of compulsory power.

We respectfully submit that, if there is any difference in standards of "cause" under the First and Fourth Amendments, our constitutional history would favor more not less stringent requirements of "cause" under the former. The second step of the Government's progression is thus no more acceptable than the first. But, even were this Court somehow to accept the principle of procedural looseness in

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cause, although Congress is exercising but secondary investigative powers in aid of its principal legislative task, than to prosecutors and grand juries exercising primary investigative power.

political inquiry advanced by the Government, it is still crystal clear that, since there is no showing *whatsoever* in this record of cause or grounds or reason or likelihood for the Subcommittee's interrogation of petitioner, his conviction must fall equally under the Government's attenuated First Amendment standard.

C. *The Government's Contention that a Committee's Failure to Meet Even the "Likelihood" Requirement of the First Amendment Is Judicially Unreviewable in a Contempt Prosecution Is Erroneous*

The court below, eschewing reliance upon the supposed anonymous letter withheld by the Government at the trial, approved petitioner's interrogation by the Subcommittee on the expansive theory that "it was surely not a 'dragnet' process to call appellant as a member of the working press to check on possible Communist Party activities among his fellow employees" (R. 244). The Government appears to have no faith in this man off the working press or man off the Times theory, for it has abandoned any effort to justify petitioner's interrogation on this rationale. Instead of the theory of the court below that a Congressional committee may call "a man off the working press" or the theory of the prosecutor and the District Court that a committee may call "a man off the street," the Government places its reliance in this Court upon a wholly new theory —namely, that a Congressional committee's assertion in a contempt prosecution that it had reason to believe the witness possessed of pertinent information, forecloses further defense and judicial review upon the constitutional issue. Posed in terms of this case, the Government's contention is that the Subcommittee Counsel's assertion—no matter how manifestly false—that there was an anonymous letter implicating petitioner, was untestable by the defense

and unreviewable by the court. In sum, while the Government admits the need under the First Amendment for the "likelihood" of relevant information by the subpoenaed witness, it would effectively deny to the witness the opportunity to prove at his trial the absence of "likelihood" and thus the violation of what the Government concedes to be his constitutional right.

Initially, we question whether the Government can substitute in this Court a different theory of "cause" than the one upon which petitioner was convicted in the District Court.[5] Having unsuccessfully sought in the District Court to rely upon a document which it would not produce, the Government cannot now sustain the criminal conviction by asking this Court to assume a fact—the existence of the letter—which the District Court, as the trier of fact, refused to find. See *Giordenello* v. *United States*, 357 U.S. 480. But even were the Government at liberty to make such a substitution on appeal, it is nevertheless clear that no more

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[5] By quoting out of context *half* a sentence of the District Court's opinion, the Government seeks to imply that the Judge found probable cause based upon the factors advanced by the Government in this Court (Brief, p. 35). Examination of the District Court's opinion will reveal that the portions of the Court's opinion immediately surrounding the half-sentence quoted by the Government makes clear that the Court "found" probable cause as an afterthought, and *only* on the basis of the theory now discarded by the Government that any employee of the New York Times could, without more, be subject to compulsory interrogation. The entire quotation from the District Court is as follows (R. 223):

> "*Beyond the fact that the Court does not find judicial power to determine what witnesses Congress may call in furtherance of its legislative purposes and compel pertinent testimony thereon*, the record of this case discloses beyond any reasonable doubt that the subcommittee had information in its possession at the time defendant was initially summoned to appear before it which established a reasonable cause for requiring his testimony. *The subcommittee had information, apart from the confidential letter, which indicated communist infiltration into the New York Typographical Union and elements of the New York newspapers, including the one by which the defendant was employed*" (unitalicized portion is what Government quotes).

than the courts below can this Court find "cause" in a supposed anonymous letter which the Government withheld at trial.

Yet the Government here blandly assumes the existence of and the alleged contents of the letter for purposes of validating petitioner's conviction (Brief, pp. 5, 53, 55-56, 59, 61). But the prosecution cannot base "cause" on the asserted contents of an anonymous letter and then hide behind "privilege" to withhold the letter from the defense. See, e.g., *United States* v. *Coplon*, 185 F. 2d 629, *cert. denied*, 342 U.S. 920. We contend here, as we did below, that the anonymous document about which witness Sourwine testified in the most contradictory and incredible fashion (see petitioner's brief, pp. 11-13) never existed or, if there is such a letter, that it either does not contain the information witness Sourwine purported to recollect or reveals on its face its own unreliability. In any event, unless the Sixth Amendment is to be held inapplicable in prosecutions under 2 U.S.C. § 192, it is submitted that the Government cannot make its constitutional showing of probable cause *or* likelihood through an anonymous document it refused to produce at the trial and upon which, for that reason, the trial judge who convicted petitioner refused to place any reliance.

The Government, of course, knows that if "cause" for the Subcommittee's interrogation of petitioner was litigable as an issue at petitioner's contempt trial, then petitioner was denied his Sixth Amendment rights by the Government's refusal to produce the supposed anonymous letter. Yet at the same time the Government is afraid to venture a candid espousal before this Court of the view that the Subcommittee's "cause" to interrogate petitioner was wholly unlitigable and unreviewable in the District Court. Accordingly, the Government (Brief, pp. 59-60) tenders a hybrid argument to this Court. It suggests that petitioner's right to litigate the question of cause went

no further than to require the Subcommittee to "present material" (p. 59) showing the basis of its decision to interrogate him and that the Subcommittee counsel having asserted the existence of information possessed by the Subcommittee (i.e., the "letter"), this was "evidence" which was "sufficient" for the Court to decide that the Subcommittee had "cause" (pp. 59-60). Realizing that such "evidence" can be "sufficient" only if the defense in a contempt case need not be confronted with evidence of "cause", the Government urges that trial of this issue "is not to be limited by the strict requirements of a criminal prosecution" (p. 60), by which the Government presumably means the requirements of the Sixth Amendment. Yet, the Government knows that it cannot rest on so blunt a departure from methods of judicial proof and therefore it urges additionally that the question of "cause" is not judicially reviewable. Thus, the Government argues that "the sufficiency of the information or reasons which cause a committee to call a witness" is not to be "subject to plenary judicial review" (p. 59) and that "the decision whether to subpoena a witness is mainly for the legislative body" (p. 60). Stripped of purposeful ambiguity, the Government is finally telling this Court that the constitutional issue respecting the Subcommittee's "cause" for calling petitioner is not to be tried at all; rather, says the Government, a committee employee having asserted "cause", the federal court must convict without further inquiry into the issue—i.e., without normal judicial review on a relevant constitutional defense (pp. 59-60).

We find it difficult to unravel the tangled argument the Government is addressing to this Court. *If* the Government is saying that the question of "cause" *is* litigable in a contempt prosecution, then the simple answer is that the Sixth Amendment knows no short-cut method of proof and secures a defendant's rights to challenge a commit-

tee's "evidence" of cause; petitioner's conviction thus cannot stand because the Government suppressed at trial the document upon which it relies. *If*, on the other hand, the Government is telling this Court that the question of cause is *not* judicially reviewable in a contempt prosecution, then affirmance is equally precluded. For the Government expressly concedes it was petitioner's First Amendment right not to be interrogated by the Subcommittee unless it believed him likely to have pertinent information, and *we know of no view under which petitioner could be barred from the assertion and trial of this relevant constitutional issue before being convicted of contempt for refusal to answer.* As Mr. Justice Frankfurter emphasized in his concurring opinion in *Watkins* v. *United States*, 354 U.S. 178, 216, by "making the federal judiciary the affirmative agency for enforcing the authority that underlies the congressional power to punish for contempt, Congress necessarily brings into play the specific provisions of the constitution relating to the prosecution of offenses and those implied restrictions under which courts function." Thus, to suggest, as the Government does, that the question of "cause" is not judicially reviewable in a contempt prosecution, is to make the federal courts vehicles for the adjudication and punishment of criminality without power to try and to determine constitutional questions upon whose resolution criminality necessarily depends. The Government's unreviewability argument cannot be accepted by this Court, for it would empower Congressional committees to subpoena the "man off the street" and require the courts to punish him for contempt regardless of the validity of his constitutional objection to answering the Committee's dragnet inquiry.

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By a succession of escalating contentions the Government hopes to have this Court approve petitioner's conviction for declining to answer questions before a Congressional committee though the record fails to contain a shred of admissible evidence that the Subcommittee had any cause or justification whatsoever for compelling petitioner to answer. First, the Government urges that the Fourth Amendment does not apply to compulsory Congressional interrogation. Next, it claims that under the First Amendment Congressional committees may conduct compulsory interrogation on the "likelihood" rather than the probability that the witness has relevant information. And finally, even that likelihood, or the lack thereof, is made judicially unreviewable in a contempt prosecution by the Government's view that it is entitled to rely for "cause" on evidence insulated from normal defense confrontation and judicial review. By this sequence of arguments, without repeating the more candid pronouncement of prosecutor Hitz at trial, the Government arrives at the same terminus—a Congressional committee may subpoena the "man off the street" and, if he refuses to answer because called without cause or justification, it may punish him for contempt.[6] Unless Congressional process is to be wholly

[6] The failure of the Government to prove "probable cause" or "likelihood" at trial underlines the significant fact that the Subcommittee failed to demonstrate or even assert "cause" when petitioner challenged the Subcommittee's jurisdiction on this ground at the hearing (R. 83-84). Perhaps under these circumstances, as in the *Watkins* case, this Court need go no further than to find that the Subcommittee's failure to respond denied petitioner fair notice under the Fifth Amendment. The Government makes no pretense that the Subcommittee ever gave petitioner the information about an anonymous letter which it subsequently sought to make the basis for a judicial finding of probable cause. Clearly, if the Subcommittee indeed had a basis for interrogating him, petitioner was entitled upon his appropriate objection to be so informed at that time. Otherwise, through ignorance of facts known only to the Subcommittee, petitioner could mistakenly believe that the Subcommittee had no probable cause or likelihood for interrogating him. It seems

free of constitutional limitations, the Government's arguments must fall and the conviction must be reversed on a record which fails in any way to justify petitioner's compulsory interrogation.

II

The Government's Bill of Particulars Precludes a Finding That Petitioner Was Apprised of a Precise Question Under Inquiry at the Hearing and Precludes a Conviction at the Trial on a Question Under Inquiry Disavowed in the Bill.

A. *Question Under Inquiry at the Hearing*

Petitioner contends that the Subcommittee's failure to inform him of the question under inquiry at his interrogation denied him due process under the Fifth Amendment. In response, the Government urges that petitioner failed to inform the Subcommittee of his doubts concerning the nature of its inquiry and that the Subcommittee was therefore under no obligation to make the matter clear to him (Brief, pp. 25-32).

But at the very outset of the Subcommittee hearing petitioner stated, "I challenge the jurisidiction of the committee to call me here in Washington, based on the fact that my testimony in executive session makes it clear that the committee will obtain no information from me that could possibly assist it in any legislative purpose . . . Furthermore, I fail to see why I am involved in this hearing . . ." (R. 84). In declining to answer certain of the subsequent questions put to him, petitioner each time reasserted his challenge to the "jurisdiction" of the Subcommittee. We submit that it is wholly immaterial that petitioner did not

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only fair that if a committee has probable cause and is challenged on this score by a witness—as it was here—the committee contemporaneously make the cause manifest.

use the word "pertinence" in making his objections. Petitioner's statement that "I fail to see why I am involved in this hearing" was a clear expression to the Subcommittee of his doubts concerning the question under inquiry which the Subcommittee desired to pursue with him. In such circumstances, the Fifth Amendment due process clause requires that a committee make *some answer* to the witness so that he may determine whether in fact the committee is pursuing with him a relevant line of question which he is required to answer. But to petitioner's inquiry, the Subcommittee made no answer.

The Government additionally urges that the subject of the Subcommittee's inquiry *was* made clear by statements of its members at the hearing regarding the Subcommittee's interest in Communist infiltration of news media. As demonstrated in petitioner's brief (pp. 17 to 21), the scope and nature of the Subcommittee's investigation, far from having such clarity and precision, has been in continuous doubt not only at the Subcommittee hearing but throughout this entire proceeding. In any event, even if it were to be conceded for sake of argument that the Subcommittee had sufficiently indicated its interest in Communist influence in news media as the subject of its investigation, what the Subcommittee manifestly declined to reveal was what relationship, if any, existed between petitioner and the subject of the investigation, i.e., *the question under inquiry in the interrogation of Robert Shelton.*[7]

But there is another and even more fatal flaw in the Government's contention that petitioner was apprised that

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[7] Recognizing and attempting to justify the Subcommittee's refusal to reveal the pertinency nexus between *petitioner* and the question under inquiry, the prosecutor asserted at trial that "We need not show pertinency between the question asked and defendant" (R. 33) and that "any question that is pertinent to that subject could be asked of anyone at all, even the most innocent person . . ." (R. 40).

the question under inquiry was Communist influence in news media. The Government provided a bill of particulars stipulating that the question under inquiry at the hearing was Communism generally and no "smaller, more limited inquiry . . ." (R. 20). It hardly lies in the mouth of the Government to contend that petitioner was apprised of a question under inquiry at the hearing which the Government stipulated was in fact *not* the question under inquiry at the hearing at all. Nor was petitioner required to defend at the trial on the theory that the question under inquiry at the hearing was anything other than what the bill of particulars said it was—i.e., Communism generally. Since that question under inquiry is not sufficiently precise under *Watkins* (see petitioner's brief, pp. 59-62) and since the Government does not even contend that it is sufficiently precise under *Watkins*, petitioner's due process rights were clearly violated before the Subcommittee.

B. *Question Under Inquiry at the Trial*

In any event, if doubt could conceivably remain that petitioner's due process rights were violated by the Subcommittee, there can be no question, in light of the bill of particulars, that the Government failed at the trial to prove a valid question under inquiry as required by 2 U.S.C. § 192. Petitioner has been convicted on the basis of a *different* "question under inquiry" from that upon which he was being tried under the bill of particulars furnished by the Government. To this point the Government now responds by asserting that petitioner has not preserved the question for this Court's review and that the bill of particulars was automatically "amended" at trial by evidence received which tended to contradict it. We demonstrate below, by a review of the sequence of relevant events, that the Government is wrong on both counts and that peti-

tioner was legally prejudiced by his conviction predicated on a different material element of the offense from the one for which he was tried.

(i) The very essence of a violation of 2 U.S.C. § 192 is failure to answer questions relevant to a "question under inquiry". Although the indictment against petitioner alleged the existence of a "question under inquiry", it failed to state what that question was. Petitioner moved to dismiss the indictment on this ground, among others, asserting his inability to determine a material element of the offense for which he was to be tried (R. 10). When this motion was denied, petitioner asked for and received a bill of particulars on the same subject, in order to ascertain in preparing his defense "what the nature of the inquiry was, because as of now we stand helpless to know what these questions were pertinent to, what the inquiry was . . ." (R. 16).

(ii) In the bill of particulars the Government gave as the "question under inquiry" to be proved under the indictment the entire authorizing resolution of the Subcommittee and *no "smaller, more limited inquiry . . ."* (R. 20). At no time before the trial or during the trial did the Government indicate any desire to depart from this question under inquiry which it had elected.[8] Nor indeed, contrary to what the Government now tells this Court (Brief, pp. 38, 40, 41), did the Government offer evidence at trial inconsistent with its bill of particulars. Rather, upon cross-examination of witness Sourwine, *petitioner* demonstrated that in the opinion of Subcommittee Counsel Sourwine there were four different questions under inquiry

[8] The Government's Brief (p. 37) quotes two statements by the Assistant United States Attorney as if they purported to refine the bill of particulars, without pointing out that the quotations are not a part of the Government's bill of particulars at all, but are taken from the previous argument before the court on the motion to dismiss the indictment (R. 17).

before the Subcommittee when petitioner was testifying (R. 138-139).

(iii) Petitioner's counsel began the closing argument to the trial court by urging the failure of the Government to prove the question under inquiry which it had elected by its bill of particulars and urging a fatal variance between that bill of particulars and evidence elicited by petitioner on cross-examination of witness Sourwine (R. 199-200).[9] The rebuttal argument by the prosecutor utterly disre-

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[9] "ARGUMENT ON BEHALF OF DEFENDANT

"Mr. Rauh: The defense contends that the Government has failed to prove what, if any, was the question under inquiry by the committee when it called defendant. Mr. Hitz, in answer to an oral question during our oral request for a bill of particulars, stated that the inquiry was the full scope of the resolution. He said as to the second asking that the Government contends and the indictment states that the inquiry being conducted was pursuant to this resolution. We do not feel and it is not the case that there was any smaller, more limited inquiry being conducted. This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose. So that in that sense, the asking No. 2 of counsel will be supplied by his reading the resolution. . . .

"And therefore we have a bill of particulars, if Your Honor please, which states that the question under inquiry, which is what Your Honor has to find these questions pertinent to under Section 192, is the full scope of 366.

"The Court: I would like to have you particularly direct your argument to Section 3, if you don't mind. I might tell you the Court has some idea now that the inquiry might have been pertinent to Section 3.

"Mr. Rauh: Yes, I shall do that.

"My first point at this stage, if Your Honor please, is that there has been a variance between the bill of particulars, in which Mr. Hitz claimed that the question under inquiry was S. 366, and the testimony of the Government that the question under inquiry was a number of other things which Mr. Sourwine then detailed. In other words, there is no testimony in this record that the question under inquiry is what Mr. Hitz said it was, namely, the full scope of S. 366. In other words, the Government has failed to prove a question under inquiry from which this Court can rule that the questions are pertinent.

"As I understand the Government's burden, it is, first, to prove what the question under inquiry is and then to show that these questions are related to it. Now I state that the Government has failed to prove that 366 was the question under inquiry, and since that was their statement in the bill of particulars, we have a fatal variance in their proof. . . ."

garded the bill of particulars; so did the opinion of the District Court which, contrary to the bill of particulars, found that the "question under inquiry" before the Subcommittee had been, not its general authorizing resolution as stipulated, but an inquiry into Communism in "the news media" (R. 225).

(iv) Petitioner repeated in the Court of Appeals (contrary to the present suggestion of the Government that he did not "raise this issue in the court of appeals"—Brief, p. 23) his challenge to the adequacy of proof of a question under inquiry under the indictment and briefed extensively the significance of the bill of particulars by which the Government had bound itself. Petitioner specifically urged upon the Court of Appeals that (Brief for Appellant, p. 17, n. 7):

> "All apart from Fifth Amendment considerations of fair notice to the witness at the time of the hearing, appellant's conviction cannot stand where, as here, the Judge found the 'question under inquiry' to be *other* than the 'question under inquiry' to which the Government bound itself by its answer to the bill of particulars. See *United States* v. *Neff*, 212 F. 2d 297, 309-310. The Judge could not properly find as proven a 'question under inquiry' which the Government was estopped from proving."

In his reply brief below, petitioner reiterated the objection (p. 4):

> "Of course, all apart from the *Watkins* rule, there was clear error below in the Government's failure to prove the 'question under inquiry', a burden imposed upon it by the statute itself. The trial judge found as proven a 'question under inquiry' which the Govern-

ment was estopped by its bill of particulars from attempting to prove . . ."

Again, however, the Government declined in the court below to make any reference whatever to the bill of particulars; nor did the Court of Appeals address itself to this question.

(v) In seeking certiorari, petitioner renewed his arguments predicated upon the bill of particulars. Petitioner urged that the question under inquiry was inadequately defined not only from the point of view of constitutional but also from the point of view of "statutory requirements", and that the question under inquiry had not been defined sufficiently precisely "to serve as a 'question under inquiry' within the meaning of 2 U.S.C. § 192" (Pet. 26). In opposition, the Government then mentioned its bill of particulars *for the first time in the entire case* and denied that any bill had been furnished (Opp. p. 15, n. 7). When petitioner pointed out to this Court the blatant inaccuracy of this Government representation (Reply Memorandum, pp. 4-8), the Government filed a Supplemental Memorandum admitting that it had been in "error" in denying the existence of a bill of particulars, but urging that in any event there was no critical variance between the bill of particulars on the "question under inquiry" and the evidence introduced at the trial (pp. 3-4).

(vi) Petitioner's brief on the merits having demonstrated the wide disparity between the bill of particulars in which the Government had disavowed any smaller inquiry than the Subcommittee's general authorizing resolution and the District Court's finding of the more limited inquiry into Communism in news media, the Government has now tendered a wholly new argument on the bill of particulars. Now the Government tells this Court (pp. 39-

40) that the bill of particulars was amended *sub silentio* and *nunc pro tunc* when evidence inconsistent therewith was adduced at trial and that petitioner was not "prejudiced" by the variance between the question under inquiry the Government elected under the indictment and that which was found by the District Court.[10]

But to say that when a defendant disproves on cross-examination a material element of the offense—i.e., the question under inquiry as stipulated in a bill of particulars—the bill thereby becomes automatically amended, is to say that a defendant may be found guilty of a different crime than that with which he is charged. Under this facile theory, the Government proves a crime whether the allegation of its bill of particulars is sustained by proof or defeated by cross-examination.

Equally startling is the Government's contention as to "prejudice." Although the bill of particulars disavowed any more limited inquiry before the Subcommittee than its authorizing resolution, according to the Government petitioner must have surmised from the transcripts of the hearings that the Government would prove a different "question under inquiry" (Brief, pp. 40-41). In the face of the unequivocal bill disavowing any "more limited inquiry being conducted" than Communism generally, the Government asserts that "petitioner knew long before his trial that that the government would attempt to prove that

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[10] The Government also suggests that while the bill of particulars stated that there was no "smaller, more limited inquiry being conducted" by the Subcommittee, the Assistant United States Attorney *"apparently meant"* only to say that the Subcommittee was not compelled to show a smaller, more limited inquiry than its full authorizing resolution (Brief, p. 36). Suffice it to say that a criminal defendant has not heretofore been required to surmise what an Assistant United States Attorney "apparently meant" in a bill of particulars, especially when the surmise as to apparent intention is directly contrary to what is actually contained in the bill.

the specific subject under inquiry by the Subcommittee was Communist activity in the communications field" (p. 41). In short, petitioner was suposed to surmise that the Government would attempt to prove at trial what it had specifically said in its bill of particulars that it would not prove.[11]

Proof of the specific "question under inquiry" is an integral part of the prosecution's burden of proof under 2 U.S.C. § 192. What is perfectly clear is that petitioner who believed he was being tried for the crime of refusing to answer questions pertinent to the subject of Communism generally was convicted of the wholly different crime of refusing to answer questions pertinent to the more limited subject of Communism in the news media. Nothing could be more clearly prejudicial than to be convicted for a crime different than the one for which a person is being tried and to which his defense is directed (see R. 210-211). Yet that is exactly what occurred here. To affirm under these circumstances would validate not only all the imprecision and looseness of process which characterized petitioner's hearings before the Subcommittee, but would compound that evil by unprecedented imprecision and looseness in his subsequent federal trial for contempt.

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[11] The Government's Brief (pp. 38-41) repeatedly refers to evidence which the Government offered at trial as if there had been some point in the trial when the Government actually made proof of the question under inquiry. The Government urges that petitioner was at that point required to claim prejudice from the variance between the bill of particulars and the proof offered by the Government (p. 41). Actually however, the prosecutor never once made reference to the question under inquiry throughout the entire trial. The only reference to the matter was not by the Government, but on cross-examination by petitioner of witness Sourwine. Accordingly, petitioner was never put on notice by anything the Government did at trial that it would rely on a different question under inquiry than the one it had elected in its bill of particulars. Petitioner thus never had the opportunity to object on the ground of variance from the bill of particulars until his argument for acquittal, when he made this exact point as his first argument (R. 199).

It is respectfully submitted that petitioner's conviction should be reversed with instruction to enter a judgment of acquittal.

Respectfully submitted,

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